STATE OF MICHIGAN
COURT OF APPEALS

DONALD J. TRUMP FOR PRESIDENT, INC., and ERIC OSTERGREN,

Plaintiffs-Appellants,

v.

JOCELYN BENSON, in her official Capacity as SECRETARY OF STATE,

Defendant-Appellee.

No.: 355378

APPEAL INVOLVING EMERGENCY ELECTION-RELATED LITIGATION

ORAL ARGUMENT REQUESTED

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APPENDIX OF APPELLANTS

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STATE OF MICHIGAN

COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC. and ERIC OSTEGREN,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendants.
_____/

OPINION AND ORDER

Case No. 20-000225-MZ

Hon. Cynthia Diane Stephens

Pending before the Court are two motions. The first is plaintiffs' November 4, 2020 emergency motion for declaratory relief under MCR 2.605(D). For the reasons stated on the record and incorporated herein, the motion is DENIED. Also pending before the Court is the motion to intervene as a plaintiff filed by the Democratic National Committee. Because the relief requested by plaintiffs in this case will not issue, the Court DENIES as moot the motion to intervene.

According to the allegations in plaintiffs' complaint, plaintiff Eric Ostegren is a credentialed election challenger under MCL 168.730. Paragraph 2 of the complaint alleges that plaintiff Ostegren was "excluded from the counting board during the absent voter ballot review process." The complaint does not specify when, where, or by whom plaintiff was excluded. Nor does the complaint provide any details about why the alleged exclusion occurred.

The complaint contains allegations concerning absent voter ballot drop-boxes. Plaintiffs allege that state law requires that ballot containers must be monitored by video surveillance. Plaintiff contends that election challengers must be given an opportunity to observe video of ballot drop-boxes with referencing the provision(s) of the statute that purportedly grant such access, . See MCL 168.761d(4)(c).

Plaintiffs' emergency motion asks the Court to order all counting and processing of absentee ballots to cease until an "election inspector" from each political party is allowed to be present at every absent voter counting board, and asks that this court require the Secretary of State to order the immediate segregation of all ballots that are not being inspected and monitored as required by law. Plaintiffs argue that the Secretary of State's failure to act has undermined the rights of all Michigan voters. While the advocate at oral argument posited the prayer for relief as one to order "meaningful access" to the ballot tabulation process, plaintiffs have asked the Court to enter a preliminary injunction to enjoin the counting of ballots. A party requesting this "extraordinary and drastic use of judicial power" must convince the Court of the necessity of the relief based on the following factors:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012).]

As stated on the record at the November 5, 2020 hearing, plaintiffs are not entitled to the extraordinary form of emergency relief they have requested.

I. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. OSTEGREN CLAIM

Plaintiff Ostegren avers that he was removed from an absent voter counting board. It is true that the Secretary of State has general supervisory control over the conduct of elections. See MCL 168.21; MCL 168.31. However, the day-to-day operation of an absent voter counting board is controlled by the pertinent city or township clerk. See MCL 168.764d. The complaint does not allege that the Secretary of State was a party to or had knowledge of, the alleged exclusion of plaintiff Ostegren from the unnamed absent voter counting board. Moreover, the Court notes that recent guidance from the Secretary of State, as was detailed in matter before this Court in *Carra et al v Benson et al*, Docket No. 20-000211-MZ, expressly advised local election officials to admit credentialed election challengers, provided that the challengers adhered to face-covering and social-distancing requirements. Thus, allegations regarding the purported conduct of an unknown local election official do not lend themselves to the issuance of a remedy against the Secretary of State.

B. CONNARN AFFIDAVIT

Plaintiffs have submitted what they refer to as "supplemental evidence" in support of their request for relief. The evidence consists of: (1) an affidavit from Jessica Connarn, a designated poll watcher; and (2) a photograph of a handwritten yellow sticky note. In her affidavit, Connarn avers that, when she was working as a poll watcher, she was contacted by an unnamed poll worker who was allegedly "being told by other hired poll workers at her table to change the date the ballot was received when entering ballots into the computer." She avers that this unnamed poll worker later handed her a sticky note that says "entered receive date as 11/2/20 on 11/4/20." Plaintiffs contend that this documentary evidence confirms that some unnamed persons engaged in

fraudulent activity in order to count invalid absent voter ballots that were received after election day.

This "supplemental evidence" is inadmissible as hearsay. The assertion that Connarn was informed by an unknown individual what "other hired poll workers at her table" had been told is inadmissible hearsay within hearsay, and plaintiffs have provided no hearsay exception for either level of hearsay that would warrant consideration of the evidence. See MRE 801(c). The note—which is vague and equivocal—is likewise hearsay. And again, plaintiffs have not presented an argument as to why the Court could consider the same, given the general prohibitions against hearsay evidence. See *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 105; 776 NW2d 114 (2009). Moreover, even overlooking the evidentiary issues, the Court notes that there are still no allegations implicating the Secretary of State's general supervisory control over the conduct of elections. Rather, any alleged action would have been taken by some unknown individual at a polling location.

C. BALLOT BOX VIDEOS

It should be noted at the outset that the statute providing for video surveillance of drop boxes only applies to those boxes that were installed after October 1, 2020. See MCL 168.761d(2). There is no evidence in the record whether there are any boxes subject to this requirement, how many there are, or where they are. The plaintiffs have not cited any statutory authority that requires any video to be subject to review by election challengers. They have not presented this Court with any statute making the Secretary of State responsible for maintaining a database of such boxes. The clear language of the statute directs that "[t]he city or township clerk must use video monitoring of that drop box to ensure effective monitoring of that drop box." MCL 168.761d(4)(c) Additionally, plaintiffs have not directed the Court's attention to any authority directing the

Secretary of State to segregate the ballots that come from such drop-boxes, thereby undermining plaintiffs' request to have such ballots segregated from other ballots, and rendering it impossible for the Court to grant the requested relief against this defendant. Not only can the relief requested not issue against the Secretary of State, who is the only named defendant in this action, but the factual record does not support the relief requested. As a result, plaintiffs are unable to show a likelihood of success on the merits.

II. MOOTNESS

Moreover, even if the requested relief could issue against the Secretary of State, the Court notes that the complaint and emergency motion were not filed until approximately 4:00 p.m. on November 4, 2020—despite being announced to various media outlets much earlier in the day. By the time this action was filed, the votes had largely been counted, and the counting is now complete. Accordingly, and even assuming the requested relief were available against the Secretary of State—and overlooking the problems with the factual and evidentiary record noted above—the matter is now moot, as it is impossible to issue the requested relief. See *Gleason v Kincaid*, 323 Mich App 308, 314; 917 NW2d 685 (2018)

IT IS HEREBY ORDERED that plaintiff's November 4, 2020 emergency motion for declaratory judgment is DENIED.

IT IS HEREBY FURTHER ORDERED that proposed intervenor's motion to intervene is DENIED as MOOT.

This is not a final order and it does not resolve the last pending claim or close the case.

November 6, 2020

Cynthia Diane Stephens
Judge, Court of Claims

CASE

Judicial Officer	Date Filed	Adjudication	Status
STEPHENS, CYNTHIA	11/4/20		OPEN

PARTICIPANTS

PLAINTIFF 1	DONALD J. TRUMP FOR PRESIDENT, INC	FILED: 11/4/20
	ATTY: MARK FERNLUND HEARNE II # 40231 PRIMARY RETAINED	
PLAINTIFF 2	OSTERGREN, ERIC	FILED: 11/4/20
	ATTY: MARK FERNLUND HEARNE II # 40231 PRIMARY RETAINED	
DEFENDANT 1	BENSON, JOCELYN	FILED: 11/4/20
	ATTY: HEATHER S. MEINGAST # 55439 PRIMARY RETAINED	
INTERVENING PLAINTIFF 1	DEMOCRATIC NATIONAL COMMITTEE	FILED: 11/5/20
	ATTY: SCOTT R. ELDRIDGE # 66452 PRIMARY RETAINED	

RECEIVABLES/PAYMENTS

	Assessed	Paid/Adjusted	Balance
PTF 1 DONALD J. TRUMP FOR PRESIDENT, INC	$175.00	$175.00	$0.00
	Assessed	**Paid/Adjusted**	**Balance**
INVP 1 DEMOCRATIC NATIONAL COMMITTEE	$20.00	$0.00	$20.00

CHRONOLOGICAL LIST OF ACTIVITIES

Activity Date	Activity		User	Entry Date
11/4/20	SUMMONS AND COMPLAINT PTF 1 PTF 2 DEF 1	$175.00	mmla mmla	11/4/20 11/4/20
11/4/20	MOTION - EMERGENCY MOTION FOR DECLARATORY JUDGMENT UNDER MCR 2.605(D) PTF 1		mmla	11/4/20
11/4/20	JUDICIAL OFFICER ASSIGNED TO STEPHENS, CYNTHIA DIANE 28417		mmla	11/4/20
11/4/20	RECEIVABLE ELECTRONIC FILING SYSTEM FEE	$25.00	mmla	11/4/20
11/4/20	RECEIVABLE FILING FEE	$150.00	mmla	11/4/20
11/4/20	PAYMENT RECEIPT NUMBER: COC-LAN.0004896 METHOD: CHECK $175.00	$175.00	mmla	11/4/20
11/5/20	MOTION OF DNC TO INTERVENE AS PLAINTIFF AND BRIEF IN SUPPORT WITH PROOF OF SERVICE INVP 1	$20.00	mmla	11/5/20
11/5/20	RECEIVABLE MOTION FEE	$20.00	mmla	11/5/20
11/5/20	NOTICE OF SUPPLEMENTAL EVIDENCE IN SUPPORT OF THEIR COMPLAINT AND MOTION FOR EMERGENCY INJUNCTIVE RELIEF PTF 1		mmla	11/5/20
11/5/20	RESPONSE TO THE DEMOCRATIC NATIONAL COMMITTEE'S MOTION TO INTERVENE		mmla	11/5/20

Activity Date	Activity	User	Entry Date
	PTF 1		
11/5/20	MOTION FOR DECLARATORY JUDGMENT VIA ZOOM SET 11/5/20 11:30 A	mmla	11/5/20
11/5/20	ORDER	mmla	11/5/20
11/5/20	PROOF OF SERVICE COMPLAINT AND MOTION FOR EMERGENCY INJUNCTIVE RELIEF PTF 1	mmla	11/5/20
11/5/20	RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR DECLARATORY JUDGMENT UNDER MCR 2.605(D) WITH PROOF OF SERVICE DEF 1	mmla	11/5/20
11/5/20	PROPOSED INTERVENORS' AMICUS BRIEF INVP 1	mmla	11/5/20
11/6/20	OPINION AND ORDER PTF 1 PTF 2 DEF 1 INVP 1	amd	11/6/20
11/9/20	COPY OF APPLICATION FOR LEAVE TO APPEAL AND MOTION FOR IMMEDIATE CONSIDERATION FILED IN COURT OF APPEALS PTF 1 PTF 2	mmla	11/9/20

STATE OF MICHIGAN

COURT OF CLAIMS

DONALD J. TRUMP

Plaintiff,

-vs- Civil Action

No. 20-000225-MZ

Hon. Cynthia D. Stephens

JOCELYN BENSON,

Defendant.

_____/

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The motion hearing regarding above case,
Taken Via Court of Claims Remote
Commencing at 11:30 a.m.,
Thursday, November 5, 2020,
Before Caitlyn Hartley, RPR, CSR-8887.

Court reporter, attorneys & witness appearing remotely.

APPEARANCES:

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Remote hearing
Thursday, November 5, 2020
About 11:30 a.m.

COURT REPORTER: My name is Caitlyn Hartley, a Michigan State notary public and certified shorthand reporter and this hearing is being held via videoconferencing equipment. The reporter is typing proceedings remotely.

JUDGE STEPHENS: Okay. This is the case of Donald J. Trump for President Inc. and Eric Ostergren versus Jocelyn Benson in her official capacity as secretary of state. Is the Court of Claims case 20-225 and we are ready to proceed. If you would invite the litigants into the hearing room. If you are speaking, I cannot hear anything. I can still hear nothing if you are speaking to me. Okay I hear a buzz. Does anyone else hear it? I don't know what its source is. Okay there are only -- why don't we try this. Could everyone mute themselves except for me and then we'll figure out perhaps then what the source is. Okay Mr. Hearne it appears that when you un-mute we get the sound so un-mute again. Mr. Hearne? You're it. We cannot hear you but we could in fact hear the awful sound. We cannot hear a -- we cannot understand a word you are saying, sir. Do you want to go out for five minutes and

attempt to -- well I guess he did.

Mr. Hearne, perhaps you need to try another piece of equipment. Mr. Hearne, perhaps you just need to be visual for a moment while I give you a secondary instruction because we are not going to be able to hear anything that you are saying. Mr. Hearne, it appears that there is a substantial difficulty and -- okay I see two of you. I don't quite know why. I can't hear either of you. The one who -- where I can see the -- I see one with a backdrop and it had no sound. Now I see Mr. Hearne with the green screen. Can you speak now and let's see what we hear?

MR. HEARNE: Yes, we've brought in another laptop Your Honor. Are you able to hear us now?

JUDGE STEPHENS: Yes. That was what I was trying to say was to get another piece of equipment, but okay.

MR. HEARNE: Thank you Your Honor. Sorry about those technical issues.

JUDGE STEPHENS: Okay. This is case 20-000225-MZ Donald J Trump For President Inc. and Eric Ostergren versus Jocelyn Benson in her official capacity as secretary of state. I would like to at least make the -- an initial apology. Emergency matters usually emerge in the middle of other matters, that's their

nature. So yesterday at 4:00 this matter was filed with the Court of Claims. At the time that it was filed there was a complaint for immediate declaratory relief filed. While it was a verified complaint it did not have an affidavit affixed to it. It did not at that point in time have a request for a temporary retraining order without notice attached to it. It did not have a request for injunctive relief attached to it. The, later in the evening the Democratic National Committee after hours filed a petition to intervene. This morning some time around 9:00 I guess a supplemental -- a set of supplemental papers were filed on a behalf of the Plaintiff, the first of which was something that addressed supplemental evidence it said and it was an affidavit from a Ms. -- I'm going to mispronounce her name but a Ms. C.

Additionally, there was a petition filed for injunctive relief. The Court determined even without a proof of service that because the nature of the proceeding that I needed to put it in the middle of our case call and that we would let parties come forward and say what they needed to say in as quick a manner as we could. The Court has not ruled on the petition to intervene filed on behalf of the democratic party but did afford them the opportunity to file papers as if

they were an amici while the Court made a determination of any standing and whether or not intervention would be granted.

With that the Court set a hearing for 11:30 thinking that my morning call for the Court of Claims -- for the Court of Appeals rather would be done by them. Unfortunately, one of my colleagues had no power and so it took us until about 10:40 to even begin the Court of Appeals docket. And it just concluded. I am very apologetic about that and appreciative of the patience of all the parties in this case. As you can imagine I have done a speed read of the multiple pieces of paper that were filed. The Defendant did in fact file a response to the injunct -- request for injunctive relief. And about two minutes ago the amici filed papers which I can earnestly tell you I have in front of me but I have not read.

The way in which I am going to proceed today without affording the proposed intervener's intervention because this is going to have to be managed today and fairly quickly, I am going to give them the courtesy of brief oral comments and I will give them that courtesy after the named parties have spoken to whatever issues they deem appropriate. Are we clear on at least how we're going to try to get through this?

MR. HEARNE: We are Your Honor.

JUDGE STEPHENS: Okay. With that we begin please with counsel for the Plaintiff.

MR. HEARNE: Yes Your Honor, thank you and good afternoon. From the Plaintiff's perspective what the relief we're asking this Court to grant is very simple and it is simply to direct that Secretary Benson order that the election county authorities and the county boards that are handling ballots allow challengers under Michigan statute to participate and to observe that process. Many of the ballots have in fact counted. Some are still being authent -- adjudication boards are still being convened and so the request is simply that Eric Ostergren who's a named party as well as the Trump campaign and their designated challengers be allowed to participate and meaningfully observe that process. It's --

JUDGE STEPHENS: Counsel, I guess what I need to understand in order for me to give injunctive relief I would have to first find that there's an immediate threat of irreparable harm and that there -- well, first that there's a substantial likelihood of success on the merits, let's start there, and in order for me to make that determination that somehow you're being deprived of meaningful participation I've got to

make a fact finding. I looked at the affidavit repeatedly and the affidavit appeared to say to me that there was a person who had been approached by another human being, who is unnamed but described as a participant in the counting process, and that that individual who is unnamed but a participant in the counting process gave information to the affiant that indicated that there was some malfeasance going forward. So what I have at best is a hearsay affidavit, I believe, that addresses a harm that would be significant but that's what it -- that's what we've got. We've got an affidavit that is not firsthand knowledge. If there is something in that affidavit that would indicate that that particular -- that the affiant observed activity that would be a deprivation of the rights of poll watches I want you to please focus my attention on that.

MR. HEARNE: I would indicate, Your Honor, attached to that was a note that was again this was an election inspector who was appointed according to the affidavit that was handling the processing of ballots, that ballots that had been sent in prior or after, excuse me, after on November 4th after the deadline were re-noted to be a ballot that was received timely and then --

JUDGE STEPHENS: Okay so I want to make sure

I'm understanding you. The affiant is not the person who's had knowledge of this; is that correct?

MR. HEARNE: The affiant had direct firsthand knowledge of the communication with the election inspector --

JUDGE STEPHENS: Which is --

MR. HEARNE: -- and the document they provided them.

JUDGE STEPHENS: Okay which is generally known as hearsay, right?

MR. HEARNE: I would not think that's hearsay, Your Honor. That's firsthand personal knowledge by the affiant of what she physically observed and we included an exhibit which is a copy, physical copy of the note that she was provided.

JUDGE STEPHENS: Okay. I'm going to see if I can pull up this physical copy of the note 'cause I'm -- while I'm doing that you can continue your argument.

MR. HEARNE: Yes Your Honor, thank you. And the gist of what we're asking both the Court to do and where we have a concern is not just this specific instance but what we're asking is that the Michigan law which election code at 168.733 has specific duties for challengers who are able to observe the processing of ballots and --

JUDGE STEPHENS: And who is it -- who is -- who has averred that they have not been given that opportunity? Did I miss that too?

MR. HEARNE: That would be Eric Ostergren who's the Plaintiff named -- one of the named Plaintiffs who was excluded from the Oakland County counting board and so he --

JUDGE STEPHENS: And the status, other than being a candidate what is his status?

MR. HEARNE: He is not a candidate. He is a challenger, a designated credentialed challenger and he was removed from the counting board and the allegation not just that he -- I mean that is what he said but then in addition to that the Trump campaign has a right as a party and a candidate in this election to have challengers meaningfully participate and that's what we're asking the Court to direct Secretary Benson to allow. We understand --

JUDGE STEPHENS: What is meaning -- what do you mean by meaningly participate? What is it that you believe they have not been afforded the opportunity to do that they have a legal right to do?

MR. HEARNE: Right. So I would refer the Court to Michigan statute in the election code 168.733, we quote it in our brief, and it provides the rights and

responsibilities of election challengers, which means they have the ability to oversee or to meaningfully observe the election inspectors' processing of ballots in the conduct of the election and that's what we're asking direction from Secretary Benson to the local counting boards that they make sure that they comply with this. I mean I can go through the statute. I don't want to take the Court's time to read it. We quote it at page four of our petition.

JUDGE STEPHENS: Okay. You may proceed.

MR. HEARNE: Yes. So that is the relief we're asking the Court to grant, Your Honor, is an order directing Secretary Benson to allow challengers designated by -- they can be Democrat or Republican but to have meaningful opportunity to oversee and observe the conduct of the election and not to exclude them but allow them to see how the election inspectors are in fact processing the ballots and authenticating them and adjudicating them.

JUDGE STEPHENS: Okay I'm going back to your affidavit. And what I have is something that says it entered received date as of 11/2 on 11/4. And it says that this was coming. It doesn't say -- it says the individual who spoke to her was a poll worker with no name. Okay.

MR. HEARNE: That is correct Your Honor. That's what the -- when you read the affidavit you will see that Ms. Conen -- Connarn indicated who is in fact herself an attorney, Michigan attorney, indicated that the poll worker indicated that this was in fact a -- she was directed to basically predate --

JUDGE STEPHENS: I understand but I'm still trying to understand why this isn't hearsay.

MR. HEARNE: Well it --

JUDGE STEPHENS: I absolutely understand that it's what the affiant says she heard someone say to her but the underlining -- the truth of the matter asserted therein that you're going for is that there was an illegal act occurring.

MR. HEARNE: Your Honor --

JUDGE STEPHENS: Or because other than that I don't know what its relevancy is.

MR. HEARNE: Right. I would say Your Honor in terms of the hearsay point this is a firsthand factual statement made by Ms. Connarn and she has made that statement based on her own firsthand physical evidence and knowledge that --

JUDGE STEPHENS: I heard somebody else say something. Tell me why that's not hearsay, come on now.

MR. HEARNE: Well it's a firsthand statement

of her physical --
JUDGE STEPHENS: It's an out-of-court statement offered for the truth of the matter asserted therein, right? So the truth is -- if the truth is that somebody told her something not what they told her. That's one thing. You want me to find the truth or at least a scintilla of truth in what she says the contents of that communication were. Right?
MR. HEARNE: What we're asking the Court to do, Your Honor, is to on the basis -- again, it's not based on what -- the relief we're asking is not just based on this affidavit. The relief we're seeking the Court to order Secretary Benson to direct election officials to allow observers and challengers in Michigan counting jurisdictions as provided by Michigan state law 168.733 --
JUDGE STEPHENS: And I've got to find that they're not doing that in order for me to have a basis to tell them to do that.
MR. HEARNE: Right. They --
JUDGE STEPHENS: So you wanted me to look at the summons and -- the complaint because you're telling me that in certain paragraphs of this complaint I'm going to see that Mr. Ostergren says that he was ousted. Does he tell me the circumstances under which he was

ousted?
MR. HEARNE: He was a designated qualified challenger and he was told to leave the counting board. That's the allegation that we make; that's the statement that we make in the verified complaint.
JUDGE STEPHENS: Okay you may proceed further.
MR. HEARNE: Again I come back, Your Honor, to what we're asking the Court to do and I know I said it several times but it's simply to direct Secretary Benson to have the local election counting boards provide meaningful opportunity for challengers from the Trump campaign as well as Mr. Ostergren and frankly I mean the other parties are parties in this litigation but we would be fine with the Biden campaign or anybody else having challengers as provided in Michigan law observe the process and that's really the relief we're requesting.
JUDGE STEPHENS: Okay. And response from the secretary of state? I don't know who's responding but.
MS. MEINGAST: Good afternoon Your Honor. Heather Meingast on behalf of Secretary Benson along with Assistant Attorney General Eric Grill. I guess first I would note I know the Court's aware that we

filed a response. That response was to the emergency motion for declaratory judgment that we received on November 4th. We did not receive a motion for injunctive relief that was apparently or purportedly filed today sometime so I'm not sure of what that pleading says and whether it negates some of the response that we've already provided but -- so we responded to the first motion. I don't have a second motion. And I think --
JUDGE STEPHENS: It's my guess --
MS. MEINGAST: Sorry.
JUDGE STEPHENS: What motion? There was the no -- the original summons and complaint didn't have a motion.
MS. MEINGAST: The summons and complaint that we had was accompanied by an emergency motion for declaratory relief.
JUDGE STEPHENS: Well that --
MS. MEINGAST: And then --
JUDGE STEPHENS: We've got a summons -- okay. All right.
MS. MEINGAST: Okay so well --
JUDGE STEPHENS: When was the request for injunctive relief served? On behalf of the Plaintiff?
MR. HEARNE: Your Honor, if I can address

that question it was served both electronically on behalf of the Plaintiffs to Secretary Benson as well as the others and we also had a process server who tried to physically deliver it to the sectary of state's office but the office was closed and they could not get access. But clearly the sectary of state has copies of all the pleadings.
MS. MEINGAST: I do not Your Honor. We do not have a copy of a motion for injunctive relief. I've looked in my e-mail. Mr. Grill has as well. If that can be sent, I'd be happy to look at it. I'm just pointing out for the record we filed a response to the initial motion and that's, you know, what I can address today and I think it's --
JUDGE STEPHENS: And I think what you're describing is the initial motion. You got pleadings in a different way than I did. I got a summons and complaint. Period. Then I got additional papers this morning. And a copy of a proof of service later this morning. I think that we're substantively talking about the same thing they just came in pieces.
MS. MEINGAST: That could be, Your Honor, and I don't know that it makes any difference. I mean our arguments wouldn't really be any different in a second motion if it was a motion for injunctive relief.

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I mean as we set out in our response there are numerous defects and problems with the pleadings that have been filed in this case. You know, most significantly here, you know, there really isn't any relief that can be granted at this time as set forth in declaration from Director Brater I mean the counting boards are done. We have finished counting AB ballots in Michigan and so there isn't any, you know, there are no more counting boards functioning as far as challengers and precinct inspectors, you know, reviewing AB ballots and processing right now. That -- those functions are complete. At least as of this morning from Director Brater and so to the extent that the Plaintiffs are requesting that we halt, you know, the processing of AB ballots so that somehow challengers can have some sort of opportunity to review the process, there isn't anymore opportunity to do so because the counting boards have completed their functions. So the ship has really sailed on the relief that they're requesting in this case.

I think -- so we pointed that out for laches argument to some extent and also really now what we're talking about is sort of a mootness argument. And I'm also a little bit confused today as to their argument about with respect to the challengers. If you look at

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their pleadings, the basis of their pleadings is that the challengers were being denied an opportunity to review surveillance video of the drop boxes. That is the basis of their complaint in the emergency motion that we read so this opportunity for a meaningful review as pled in the pleadings is that they wanted some sort of opportunity to review surveillance video of drop boxes. And so that's how we addressed our pleadings, our response because that's how it was pled. I didn't hear any of that today.

JUDGE STEPHENS: Additionally, Ms. Meingast they did say in the second paragraph that the named Plaintiff was removed.

MS. MEINGAST: Right. But if you look -- that's why their pleadings are confusing because their pleadings talk about election inspectors of both parties not being present for various aspects of the counting board process. Mr. Ostergren is not an election inspector he's a challenger. And so there is some -- to me there's some we're at sixes and sevens with respect to what the pleadings are actually saying and what kind of is really going on or what the law is; and Mr. Ostergren doesn't explain where he was excluded from, which AB counting board, what day that happened, why he was excluded. And that doesn't even really feed

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into -- his exclusion for whatever reason doesn't feed into the claims that they've pled, which their arguments are that election inspectors from both parties are not always present at the counting boards to review the process. That's what their claim is and that challengers are not having an opportunity to review the surveillance video.

So that's I'm just going on what the pleadings say, Your Honor, as the source of their alleged injury. It's not really kind of matching up with the argument that we're hearing from counsel this morning and, again, at this point it's all really moot because the counting boards are complete. We've moved on to the sort of the second phase and all of this -- all of the unofficial results and all the poll books and all the ballots and all that will be moving on to the county canvass for the boards, the counting boards to look at so, you know, there isn't any relief that can be given at this time with respect to, you know, halting this process and allowing challengers more opportunity to review or to stick some alleged irregularity in not having precinct inspectors or election inspectors of both parties present for these functions. So, you know, that's what we've perhaps responded in our response. They also lack standing.

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And then if you even get down into the merits of their claims, if you even got there, there really isn't anything to it because they don't have it. You know, there is no right to review the surveillance video and there isn't really any kind of obligation as we read the statute that somehow, you know, elector inspector of both parties has to be present 100 percent of the time and 100 percent of the places at the absent voter counting board so I just feel like there's a little bit of disconnect between what their pleadings actually state and some of the argument that we've heard today.

JUDGE STEPHENS: Okay. On behalf of the proposed intervener present amici.

MR. HAMILTON: Good afternoon Your Honor. Kevin Hamilton for the Democratic National Committee. And first I'd like to thank Your Honor for the opportunity to appear and I'll be brief. I believe the motion should be denied for several reasons.

First, the Plaintiffs have failed to establish an actual controversy under MCR 2.605 which would be necessary in order to pursue a claim for the simple reason that the factual record before the Court doesn't support the relief sought; and in any event the claim is largely moot at this point for the reasons

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Ms. Meingast just pointed out that the counting boards are largely complete now and so the relief is simply unavailable.

On the first point no evidence in the record would allow the Court to conclude that the Plaintiffs have demonstrated a likelihood of success on the merits which as Your Honor pointed out a moment ago is a necessary finding in order to enter injunctive relief here. The affidavit obviously is hearsay, Your Honor, at least single hearsay perhaps double hearsay. And that is simply insufficient under any standard to justify declaratory relief.

Moreover, as we've outlined in our papers and I know Your Honor hasn't had the chance to review those yet, they sued the wrong Defendant. The secretary doesn't operate these counting boards the counties do. They are created and operated by local government. Those local governments the counties were not named as Defendants nor could they have been before this Court whose jurisdiction is limited under MCL 600.6419. So that's obviously a problem with the relief sought.

On the merit as counsel just pointed out a moment ago there's no right to video surveillance of voters casting ballots whether they're casting them in person or at drop boxes. And counsel doesn't even

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really pretend otherwise. He cites no statute and no case law that suggests that a voter or a political party or candidate has a right to surveil or review video surveillance of voters casting ballots. And in any event even if there were some sort of factual record, and there's not, that might support the Court in finding some kind of violation of the challenger statute, Michigan law provides a remedy for that. It's a criminal penalty. The legislature thought about that. What the legislature did not provide is any sort of statutory authority for a Court to conclude that some violation has occurred and therefore you should stop the count. Or enter some broad injunctive relief. That's just made up out of whole cloth. And, again, Plaintiffs don't identify any authority for that proposition at all and, you know, it's not surprising. There just isn't any.

There's a period of elections clause claim and an equal protection claim. Neither of those find any support in the law. The Trump campaign has asserted similar equal protection claims elsewhere in this in the course of this campaign. They have been uniformly rejected. Trump versus Boockvar in Pennsylvania was a similar rest -- claim relating to restrictions on poll watchers and challengers. The court rejected it there

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for exactly the reasons that we're talking about here. The claim was based on -- I'm quoting, "based on a series of speculative events which falls short of the requirement to establish a concrete injury." I won't go through the other cases, Your Honor. They're cited in our brief and we quote them at length so for all those reasons, Your Honor, we think the motion should be denied. It's unsupported by the factual record before the Court. The only evidence that's before you is both irrelevant to the actual claims in the motion and the pleadings as Ms. Meingast points out and hearsay as Your Honor has already noted. The claims are unsupported by the law and they named the wrong Defendants. So all of this is simply an effort to stop the counting of ballots cast by Michigan voters who were fully entitled to vote and are fully entitled to have their ballots counted promptly and in accordance with Michigan law. So there's no support for this motion, Your Honor, and there's no support for this litigation. The motion should be denied and the lawsuit should be dismissed. Thank you Your Honor.

JUDGE STEPHENS: Is there anything else you would wish to say sir?

MR. HAMILTON: No. Other than --

JUDGE STEPHENS: I'm sorry I should have

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said on behalf of the petitioner.

MR. HAMILTON: Okay thank you Your Honor.

JUDGE STEPHENS: On behalf of the petitioner I do have -- I did have a couple questions. Now it was I think last week, Mr. Grill, that we had a case that was filed against the sectary of state regarding this quote meaningful access; am I remembering correctly Mr. Grill?

MR. GRILL: There was a case about challengers Your Honor. There have been many cases I think.

JUDGE STEPHENS: But that -- and that one was resolved by the parties and the question there was to have the sectary of state revise her instructions to the local election officials regarding issues of COVID-19 and in that case --

MR. GRILL: Correct.

JUDGE STEPHENS: And in that case the question was how could the qualified challengers have meaningful access to execute their functions? And the parties entered into an agreement and a new directive was issued by the secretary of state to the local elective officials regarding things like distancing, et cetera. That was a recognition, Mr. Hearne, that while the sectary of state has a future function in this

electoral process other than giving directive and intervening in specific circumstances where extraordinary relief is requested and warranted, that the secretary does not conduct local elections nor does the secretary's office have responsibility for the initial ballot tabulation. So, and I need some help from you on how the party against whom you have filed suit is a party who has the capacity to do what you've asked even if it is warranted.

MR. HEARNE: Thank you Your Honor. Yes, no the Secretary Benson is Michigan's chief election official of course and the local election jurisdictions act under her direction. She does have the responsibility to oversee the conduct of the election. In fact, there was the Western District of Michigan federal case where they did in fact name Secretary Benson and then they named a number of local election jurisdictions and in that case the sectary of state responded by saying that the local election jurisdiction should not have been named but she should just be the sole defendant and that's in fact what was done and that's --

JUDGE STEPHENS: But what was the issue there? What was the issue and was that your -- there have been so many and for every Court of Claims case

there have been two federal cases so I know why Mr. Grill and Ms. Meingast are a little confused. There was a case filed in the district regarding the mailing of absentee ballot applications. There was a case filed regarding the processing of absentee ballot application signatores. And a few others. So I don't know what that Western District case was about. But every case that I have had it has been acknowledged and it is my understanding of the law the State of Michigan that while she does provide supervision in the broader sense and she does provide direction that it is not she who would be saying at precinct five district six you Mr. Challenger, you Ms. Challenger may be three feet away, two feet away. You may approach the poll book and take it in your hands. You may not. So I'm trying to understand this direction for meaningful access. She has issued a directive for what was described as meaningful access, which enumerated the functions of challengers and poll watchers from the statute. She's issued that.

MR. HEARNE: Correct.

JUDGE STEPHENS: At best -- at best what you gave me in paragraph -- Mr. Ostergren says that he was in fact a credentialized official and he says he was ousted from a polling place but he doesn't tell me where

or when or any circumstances. Your affiant says that another person came to her at a specific place at least and told her that there were -- there was activity going on that was inappropriate. Your pleadings spoke in significant detail about what credentialized officials were supposed to do under the statute and speaks with great particularity about the ability to observe certain videotapes. I'm in a quandary here.

MR. HEARNE: Your Honor, I will try to assist and clarify the extent that there's an issue. What we're asking, and let me talk about the videotapes and the ballot boxes those are essentially equivalent to a polling place and the statute that was adopted by the Michigan this, I mean liberally last month provides for video surveillance of those ballot boxes. The reason for that is to provide transparency of the election process so when those ballots are authenticated and counted, that there's an opportunity to observe that and observe the casting of the ballots in the ballot -- these remote ballot boxes. That's the part of the complaint that asks to have challengers have access to those videotapes, the video surveillance --

JUDGE STEPHENS: So let me put a pin there. So when you were describing quote meaningful access you wanted this Court to order, ignore the fact that

counting is done but you wanted this Court to order that each and every videotape be presented to or be available for challengers prior to the counting of the ballots?

MR. HEARNE: That would be the request that we have that the challengers have the opportunity to review the videotape, which is in the possession -- let me be even more precise, Your Honor.

Our request is that Secretary Benson issue a directive to the election jurisdictions making that video available so that challengers can have some transparency and observe the casting of ballots in these remote ballot drop boxes. That's --

JUDGE STEPHENS: Okay so remote ballot drop boxes. So it's your contention there was a requirement that for every drop box that there be a videotape made of that drop box; that's correct?

MR. HEARNE: That's what the Michigan statute provides, Your Honor.

JUDGE STEPHENS: Okay. And the drop boxes were placed -- were the drop boxes not placed prior to the passage of that statute?

MR. HEARNE: The statute makes a distinction between drop boxes that were placed prior and drop boxes that were placed after October 1st and so the request is the statute requires the video surveillance of the

ballot drop boxes and that requirement becomes effective, and I would quote it to you I just don't have it right in front of me right now, that is I believe October 1st and thereafter. And all we're asking is that the -- a challenger be able to review that video for those ballots that are processed out of those video drop boxes. And then --

JUDGE STEPHENS: So just a question as of this point there -- let's -- there -- there's a drop box. Once the ballots are taken out of the drop box are they segregated based upon which drop box they came from?

MR. HEARNE: We have asked that that -- there's other litigation by other parties that has asked that they be segregated so that you can identify what ballots came from what box and you can tie that back to a video.

JUDGE STEPHENS: But as -- there was -- are you saying there was a statutory requirement that they be segregated?

MR. HEARNE: There is not a statute requirement to be segregated but there is --

JUDGE STEPHENS: Okay. So are you alleging there was a practice or routine where the individual local elected officials, election officials, separated

the boxes based upon which drop box?

MR. HEARNE: The request that we have of Secretary Benson --

JUDGE STEPHENS: That's not what I'm asking you. I'm asking you as a matter of fact are you alleging that the individual election officials had a practice that segregated the ballots per ballot drop box?

MR. HEARNE: I can't tell you, Your Honor, because there's so many election jurisdictions in Michigan which one --

JUDGE STEPHENS: Yeah.

MR. HEARNE: -- did in fact do that or which ones didn't and so I can't make a representation to the Court as to what in fact each jurisdiction did do.

JUDGE STEPHENS: Okay. So we know that there were, maybe we know, that there were additional drop boxes added. I don't know if there were or not. And we do not know whether or not the contents of those drop boxes as of October 2nd were segregated from those contents that were there before October 1st. We just know that somehow those ballots were taken from their secure drop boxes to the local election official and at some point were processed. That's pretty much all we know, right?

MR. HEARNE: That is correct Your Honor. I would add though --

JUDGE STEPHENS: Okay.

MR. HEARNE: -- we also know that there was a legal requirement and purportedly all the election officials honored that of having video surveillance and the reason that we think that's important is because for a challenger, for one of the parties to an election to have the kind of transparency we think elections in Michigan certainly requires elections to have, to have that surveillance to have the opportunity for a challenger to see that video is what we've requested in addition to having challengers present and this Your Honor goes to the theme of the whole complaint that we have filed. Just to have transparency just to be able to have challengers do what Michigan law says observe the casting of ballots and the counting --

JUDGE STEPHENS: Okay so I understand that you believe the casting of ballots includes the drop boxes and being able to almost as if it were a drug deal follow the chain of custody. Okay I understand. What else other than -- is there something -- the parties don't seem to disagree, well maybe they do. Mrs. Meingast, do you have knowledge of drop boxes that were created post October 1?

MS. MEINGAST: We do not. The Sectary of State of the Bureau of Elections does not maintain or possession information about when a particular drop box was installed by a jurisdiction so we wouldn't know whether it existed before October 1st or after October 1st necessarily.

JUDGE STEPHENS: Okay. All right. Please continue Mr. Hearne.

MR. HEARNE: Your Honor, again I come back to my central point and I have nothing further to really add to that is just the request that we have is that the challengers be able to access the process, be present in the processing of the ballots as provided in Michigan statute and that includes obviously in the counting boards to be meaningfully available to observe the process and then what we've mentioned on the drop boxes is that they would have the ability to review the video of that drop box as required -- as the video was required by Michigan statute.

JUDGE STEPHENS: I'm going to assume and presume that the Plaintiffs' notice in filing this suit are as they are stated to maintain the integrity of elections. I'm similarly presuming that the respondents and the proposed amici -- proposed intervener slash amici shared those same values. The issue in front of

me is whether or not I would issue extraordinary and extensive relief based upon the record before me. The record before me at best is an assertion that the sectary of state has direct authority over the individual precincts and polling places, the counting process, the transport of all AB ballots, the observation process during the counting of those ballots. It is -- and that's a legal assertion. Factually, there is a claim that there has not been an opportunity to observe videotapes of certain ballot drop boxes that were created after October 1 with no note as to where they are, who created them nor a statutory assertion that it was the duty of the secretary of state to maintain a listing of those drop boxes so that she could actually order that the videotapes be presented if there is a legal right to do so. There is an allegation, a verified allegation by the named individual Plaintiff in this case that he a qualified elector and credentialized poll watcher or poll official in Roscommon county was at some point in time removed from the counting process. The circumstances unknown. There is an affidavit that an individual, I'm told a lawyer and a member of the bar but no doubt a qualified elector of the state of Michigan was approached by another human being who was purported to be a poll

worker and that human being told her that someone else told that poll worker to alter a date of receipt of a ballot from the day after the election to the day before the election and that this occurred on November 4th.

The request for relief as I understand it is going to be denied in a written order, which will not come out today but an order which will indicate that the basis for denial -- bases for denial are these: First, that the secretary of state as the supervisor of elections provides direction to the local officials as to how they can comply with the laws of the state of Michigan. She has issued such directives particularly one in a case before me, which the number of which I will list later, which indicated that meaningful access and an outline of each of the obligations and opportunities and responsibilities of poll watchers was elucidated and that she has told the local elected officials to give people that access. Access to videotapes was not a part of the access that was addressed there because they were dealing with active polling places. I will acknowledge that. In this instance where the issue is the day to day conduct of a vote count the individuals who bear that responsibility absent the secretary of state removing them from their responsibility because of misfeasance or malfeasance

lies with the local election officials. So the relief that is being requested in substantial part is completely unavailable through the secretary of state.

Additionally, even if this relief were available as opposed to when this suit was announced yesterday morning and the count was beginning, it was filed at 4:00 at which point the count had largely proceeded I am told but as of this point the essence of the count is completed and the relief requested other than the relief to observe the videotapes is completely unavailable.

The Court would finally find that as to the one issue for which relief is arguably available that on this factual record I have no basis to find that there's a substantial likelihood of success on the merits as relates to this Defendant. Nor am I convinced that there is a clear legal duty on the part of anyone who is properly before this Court to manage this issue.

I will endeavor to get an order out no later than tomorrow afternoon but I have both an afternoon Court of Appeals case call and a full case call tomorrow morning. With that I would thank you all for your presentations and would adjourn this matter where I believe everyone here at their best seeks to have a full and fair election process. Thank you.

MR. HEARNE: Thank you Your Honor.
MR. HAMILTON: Thank you Your Honor.
MR. GRILL: Thank you your honor.
(Hearing concluded at 1:16 p.m.)

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STATE OF MICHIGAN)
)
COUNTY OF WASHTENAW)

CERTIFICATE OF NOTARY PUBLIC AND COURT REPORTER

I, Caitlyn Hartley, do hereby certify that the foregoing virtual hearing was duly recorded by me stenographically and by me later reduced to typewritten form by means of computer-aided transcription; and I certify that this is a true and correct transcript of my stenographic notes so taken.

I further certify that I am neither of counsel to either party nor interested in the event of this cause.

Caitlyn Hartley, RPR, CSR-8887
Notary Public,
Washtenaw County, Michigan
My Commission expires: August 15, 2021

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC, and
ERIC OSTERGREN,

Plaintiffs,

v.

JOCELYN BENSON, in her official Capacity as SECRETARY OF STATE

Defendants.

Case No. 20- 000225 -MZ
Stephens

VERIFIED COMPLAINT FOR IMMEDIATE DECLARATORY AND INJUNCTIVE RELIEF

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

PARTIES

A. Plaintiffs Donald J. Trump for President, Inc., and Eric Ostergren

1. Donald J. Trump for President, Inc. of the United States of America and is a candidate for reelection in the 2020 general election. Donald J. Trump for President, Inc., is the campaign committee for President Trump and Vice President Pence.

2. Eric Ostergren is a registered voter of Roscommon County, Michigan and credentialed and trained as an election "challenger." Eric Ostergren was excluded from the counting board during the absent voter ballot review process.

B. Joselyn Benson is Michigan's Secretary of State responsible for overseeing Oakland County's conduct of the 2020 presidential election.

3. Jocelyn Benson is Michigan's Secretary of State and is the "chief elections officer" responsible for overseeing the conduct of Michigan elections. MCL 168.21 ("The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act."); 168.31(1)(a) (the "Secretary of State shall … issue instructions and promulgate rules … for the conduct of elections and registrations in accordance with the laws of this state"). Local election officials must follow Secretary Benson's instructions regarding the conduct of elections. Michigan law provides that Secretary Benson "[a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(b). *See also Hare v. Berrien Co Bd. of Election*, 129 N.W.2d 864 (Mich. 1964); *Davis v. Sec'y of State*, 2020 Mich. App. LEXIS 6128, at *9 (Mich. Ct. App. Sep. 16, 2020).

4. Secretary Benson is responsible for assuring Michigan's local election officials conduct elections in a fair, just, and lawful manner. *See* MCL 168.21; 168.31; 168.32. *See also League of Women Voters of Michigan v. Secretary of State*, 2020 Mich. App. LEXIS 709, *3 (Mich. Ct. App. Jan. 27, 2020); *Citizens Protecting Michigan's Constitution v. Secretary of State*, 922 N.W.2d 404 (Mich. Ct. App. 2018), *aff'd* 921 N.W.2d 247 (Mich. 2018); *Fitzpatrick v. Secretary of State*, 440 N.W.2d 45 (Mich. Ct. App. 1989).

JURISDICTION AND STANDING

5. The Court of Claims has "exclusive" jurisdiction to "hear and determine any claim or demand, statutory or constitutional," or any demand for "equitable[ ] or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers

notwithstanding another law that confers jurisdiction of the cast in the circuit court." MCL 600.6419(1)(a).

6. Donald J. Trump has a special and substantial interest in assuring that Michigan processes the ballots of Michigan citizens case according to Michigan law so that every lawful Michigan voter's ballot is fairly and equally processed and counted. Eric Ostergren has a special and substantial interest under Michigan law as a credentialed election challenger to observe the processing of absent voter ballots.

7. Plaintiffs raise statutory and constitutional claims asking this Court to order equitable, declaratory, and extraordinary relief against Secretary of State Benson. This Court has exclusive jurisdiction to hear these claims. Venue is appropriate in this Court.

8. An actual controversy exists between Plaintiffs and Secretary of State Benson. Plaintiffs has suffered, or will suffer, an irreparable constitutional injury should Secretary Benson continue to fail to ensure that Michigan complies with Michigan law allowing challengers to meaningfully monitor the conduct of the election.

BACKGROUND

9. A general election is being held in the State of Michigan on November 3, 2020.

10. MCL 168.765a, regarding Absent Voter Counting Boards, where absentee votes are processed and counted, states in relevant part as follows:

> At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed.

11. Michigan absent voter counting boards are not complying with this statute. These boards are being conducted without inspectors from each party being present.

12. Further, a political party, incorporated organization, or organized committee of interested citizens may designate one "challenger" to serve at each counting board. MCL 168.730.

13. An election challenger's appointed under MCL 168.730 has those responsibilities described at MCL 168.733.

14. An election challenger's legal rights are as follows:

a. An election challenger shall be provided a space within a polling place where they can observe the election procedure and each person applying to vote. MCL 168.733(1).

b. An election challenger must be allowed opportunity to inspect poll books as ballots are issued to electors and witness the electors' names being entered in the poll book. MCL 168.733(1)(a).

c. An election Challenger must be allowed to observe the manner in which the duties of the election inspectors are being performed. MCL 168.733(1)(b).

d. An election challenger is authorized to challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector. MCL 168.733(1)(c).

e. An election challenger is authorized to challenge an election procedure that is not being properly performed. MCL 168.733(1)(d).

f. An election challenger may bring to an election inspector's attention any of the following: (1) improper handling of a ballot by an elector or election inspector; (2) a violation of a regulation made by the board of election inspectors with regard to the time in which an elector may remain in the polling place; (3) campaigning and fundraising being performed by an election inspector or other person covered by MCL 168.744; and/or (4) any other violation of election law or other prescribed election procedure. MCL 168.733(1)(e).

g. An election challenger may remain present during the canvass of votes and until the statement of returns is duly signed and made. MCL 168.733(1)(f).

h. An election challenger may examine each ballot as it is being counted. MCL 168.733(1)(g).

i. An election challenger may keep records of votes cast and other election procedures as the challenger desires. MCL 168.733(1)(h).

j. An election challenger may observe the recording of absent voter ballots on voting machines. MCL 168.733(1)(i).

15. Michigan values the important role challengers perform in assuring the transparency and integrity of elections. For example, Michigan law provides it is a felony punishable by up to two years in state prison for any person to threaten or intimidate a challenger who is performing any activity described in Michigan law. MCL 168.734(4); MCL 168.734. It is a felony punishable by up to two years in state prison for any person to prevent the presence of a challenger exercising their rights or to fail to provide a challenger with "conveniences for the performance of the[ir] duties." MCL 168.734.

16. Local election jurisdictions locate ballot drop-off boxes without opportunity for challengers to observe the process, and as such Secretary Benson violates her constitutional and statutory authority and damages the integrity of Michigan elections.

17. Michigan law requires that ballot containers be monitored by video surveillance. See Senate Bill 757 at 761d(4)(c).

18. Secretary Benson is violating the Michigan Constitution and Michigan election law by allowing absent voter ballots to be processed and counted without allowing challengers to observe the video of the ballot boxes into which these ballots are placed.

19. Plaintiffs asks Secretary Benson to segregate ballots cast in these remote and unattended ballot drop boxes and, before the ballots are processed, removed from their verifying envelopes, and counted, allow designated challengers to view the video of the remote ballot box.

20. Secretary Benson's actions and her failure to act have undermined the constitutional right of all Michigan voters – including the voters bringing this action – to participate in fair and lawful elections. These Michigan citizens' constitutional rights are being violated by Secretary

Benson's failure to prevent unlawful ballots to be processed and her failure to ensure that statutorily-authorized challengers have a right to do their job.

COUNT I

Secretary Benson violated the Equal Protection Clause of Michigan's Constitution

21. Michigan's Constitution declares that "[n]o person shall be denied the equal protection of the laws …." Const 1963, art 1, § 2.

22. This clause is coextensive with the United States Constitution's Equal Protection Clause. *Harville v. State Plumbing & Heating* 218 Mich. App. 302, 305-306; 553 N.W.2d 377 (1996). *See also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, (1966) ("Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.")[1]

23. Plaintiff seeks declaratory and injunctive relief requiring Secretary Benson to direct that election authorities comply with Michigan law mandating election inspectors from each party and allowing challengers access to video of ballot boxes before counting of relevant votes takes place.

[1] Most United States Supreme Court rulings concerning the right to vote frame the issue in terms of the Equal Protection Clause. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance & Procedure* §18.31(a) (2012 & Supp. 2015).

COUNT II

Secretary Benson and Oakland County violated Michigan voters' rights under the Michigan Constitution's "purity of elections" clause.

24. The Michigan Constitution's "purity of elections" clause states, "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." Const. 1963, art 2, §4(2).

25. "The phrase 'purity of elections' does not have a single precise meaning. But it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v. Detroit Election Comm.*, 854 N.W.2d 489, 504 (Mich. Ct. App. 2014).

26. Michigan statutes protect the purity of elections by allowing ballot challengers and election inspectors to monitor absentee ballots at counting boards.

27. Plaintiff seeks declaratory and injunctive relief requiring Secretary Benson to direct that election authorities comply with Michigan law mandating election inspectors from each party and allowing challengers access to video of ballot boxes before counting of relevant votes takes place.

COUNT III

The Secretary of State is Violating of MCL 168.765a.

28. MCL 168.765a, regarding Absent Voter Counting Boards, where absentee votes are processed and counted, states in relevant part as follows:

> At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed.

29. Michigan absent voter counting boards, under the authority of Secretary Benson. are not complying with this statute. These boards are being conducted without inspectors from each party being present.

PRAYER FOR RELIEF

These Michigan citizens and voters ask this Court to:

A. Order "a speedy hearing" of this action and "advance it on the calendar" as provided by MCR 2.605(D);

B. Mandate that Secretary Benson order all counting and processing of absentee votes cease immediately until an election inspector from each party is present at each absent voter counting board and until video is made available to challengers of each ballot box;

C. Mandate that Secretary Benson order the immediate segregation of all ballots that are not being inspected and monitored as aforesaid and as is required under law.

D. Award these Michigan citizens the costs, expenses, and expert witness fees they incurred in this action as allowed by law.

Dated: November 4, 2020

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II
MARK F. (THOR) HEARNE, II
#P40231
STEPHEN S. DAVIS
J. MATTHEW BELZ
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VERIFICATION

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

I, Eric Ostergrenbeing first duly sworn, depose and say that I am a resident of the state of Michigan and duly qualified as a voter in this state. While I may not have personal knowledge of all of the facts recited in this Complaint, the information contained therein has been collected and made available to me by others, and I declare, pursuant to MCR 2.114(B)(2), that the allegations contained in this Complaint are true to the best of my information, knowledge, and belief.

Subscribed and sworn to before me this 4th day of ~~October~~ November, 2020.

Notary Public

Midland County, Michigan

My Commission Expires: 11-22-2023

Acting in Midland County, Michigan

LORI A LECRONIER
Notary Public - State of Michigan
County of Midland
My Commission Expires Nov 22, 2023
Acting in the County of Midland

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DONALD J. TRUMP, and
ERIC OSTERGREN

Plaintiffs,

v.

Case No.: 20-000225-MZ
Stephens

JOCELYN BENSON, in her official
Capacity as SECRETARY OF STATE

Defendants.

Mark F. (Thor) Hearne, II (P40231)
Stephen S. Davis (*pro hac* pending)
J. Matthew Belz (*pro hac* pending)
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Counsel for Plaintiffs

PLAINTIFFS' NOVEMBER 4, 2020 EMERGENCY MOTION FOR DECLARATORY JUDGMENT UNDER MCR 2.605(D)

Donald J. Trump and Eric Ostergren ask this Court, under MCR 2.605(D) (applicable through MCL 600.6422 and LCR 2.119), for expedited consideration of their request for declaratory relief. A speedy hearing is necessary to avoid prejudice that will inevitably result if Secretary of State Jocelyn Benson continues her acts in violation of Michigan's Constitution and Election Code.

INTRODUCTION

Michigan law requires that absent voter ballots be processed by bipartisan teams. Michigan law also allows "challengers" to monitor the absentee ballot process and challenge ballots that do not meet Michigan's strict compliance with absent voting procedures. MCL 168.730-168.734.

In order to preserve the process of a fair and open election under the Michigan's Equal Protection and Purity of Elections clauses, these Michigan voters ask this Court to mandate that Secretary Benson order all counting and processing of absentee votes cease immediately until an election inspector from each party is present at each absent voter counting board and mandate that Secretary Benson order the immediate segregation of all ballots that are not being inspected and monitored as is required under law.

JURISDICTION AND THE NATURE OF PLAINTIFFS' CLAIMS AGAINST SECRETARY BENSON

1. This Court has exclusive jurisdiction over these Michigan voters' declaratory judgment claim against Secretary Benson. Secretary Benson is deemed to be the "state or any of its departments or officers" as this phrase is defined by MCL 600.6419(1) and (7).

2. Michigan Court Rule 2.605(D) authorizes this Court to "order a speedy hearing of an action for declaratory relief" and to "advance it on the calendar." The legal issues presented herein warrant an expedited hearing.

3. Expedited consideration of this matter is needed because, by allowing local election jurisdictions to locate these ballot drop-off boxes without opportunity for challengers to observe the process, Secretary Benson violates her constitutional and statutory authority and damages the integrity of Michigan elections.

4. Secretary Benson is violating the Michigan Constitution and Michigan election law by allowing absent voter ballots to be processed and counted without bipartisan teams and without allowing challengers to observe this process.

5. Secretary Benson's actions and her failure to act have undermined the constitutional right of all Michigan voters – including the voters bringing this action – to participate in fair and lawful elections. These Michigan citizens' constitutional rights are being violated by Secretary Benson's failure to prevent unlawful ballots to be processed and her failure to ensure that statutorily-authorized challengers have a right to do their job.

LAW AND LEGAL ANALYSIS

6. A general election is being held in the State of Michigan on November 3, 2020.

7. MCL 168.765a, regarding Absent Voter Counting Boards, where absentee votes are processed and counted, states in relevant part as follows:

At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed.

8. Michigan absent voter counting boards are not complying with this statute. These boards are being conducted without inspectors from each party being present.

9. Further, a political party, incorporated organization, or organized committee of interested citizens may designate one "challenger" to serve at each counting board. MCL 168.730.

10. An election challenger's appointed under MCL 168.730 has those responsibilities described at MCL 168.733.

11. An election challenger's legal rights are as follows:

a. An election challenger shall be provided a space within a polling place where they can observe the election procedure and each person applying to vote. MCL 168.733(1).

b. An election challenger must be allowed opportunity to inspect poll books as ballots are issued to electors and witness the electors' names being entered in the poll book. MCL 168.733(1)(a).

c. An election Challenger must be allowed to observe the manner in which the duties of the election inspectors are being performed. MCL 168.733(1)(b).

d. An election challenger is authorized to challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector. MCL 168.733(1)(c).

e. An election challenger is authorized to challenge an election procedure that is not being properly performed. MCL 168.733(1)(d).

f. An election challenger may bring to an election inspector's attention any of the following: (1) improper handling of a ballot by an elector or election inspector; (2) a violation of a regulation made by the board of election inspectors with regard to the time in which an elector may remain in the polling place; (3) campaigning and fundraising being performed by an election inspector or other person covered by MCL 168.744; and/or (4) any other violation of election law or other prescribed election procedure. MCL 168.733(1)(e).

g. An election challenger may remain present during the canvass of votes and until the statement of returns is duly signed and made. MCL 168.733(1)(f).

h. An election challenger may examine each ballot as it is being counted. MCL 168.733(1)(g).

i. An election challenger may keep records of votes cast and other election procedures as the challenger desires. MCL 168.733(1)(h).

j. An election challenger may observe the recording of absent voter ballots on voting machines. MCL 168.733(1)(i).

12. Michigan values the important role challengers perform in assuring the transparency and integrity of elections. For example, Michigan law provides it is a felony punishable by up to two years in state prison for any person to threaten or intimidate a challenger who is performing any activity described in Michigan law. MCL 168.734(4); MCL 168.734. It is a felony punishable by up to two years in state prison for any person to prevent the presence of a challenger exercising their rights or to fail to provide a challenger with "conveniences for the performance of the[ir] duties." MCL 168.734.

13. Local election jurisdictions locate ballot drop-off boxes without opportunity for challengers to observe the process, and as such Secretary Benson violates her constitutional and statutory authority and damages the integrity of Michigan elections.

14. Michigan law requires that ballot containers be monitored by video surveillance. See Senate Bill 757 at 761d(4)(c).

15. Secretary Benson is violating the Michigan Constitution and Michigan election law by allowing absent voter ballots to be processed and counted without allowing challengers to observe the video of the ballot boxes into which these ballots are placed.

16. Plaintiffs asks Secretary Benson to segregate ballots cast in these remote and unattended ballot drop boxes and, before the ballots are processed, removed from their verifying envelopes, and counted, allow designated challengers to view the video of the remote ballot box.

17. Secretary Benson's actions and her failure to act have undermined the constitutional right of all Michigan voters – including the voters bringing this action – to participate in fair and lawful elections. These Michigan citizens' constitutional rights are being violated by Secretary Benson's failure to prevent unlawful ballots to be processed and her failure to ensure that statutorily-authorized challengers have a right to do their job.

18. Michigan's Constitution declares that "[n]o person shall be denied the equal protection of the laws …." Const 1963, art 1, § 2.

19. This clause is coextensive with the United States Constitution's Equal Protection Clause. *Harville v. State Plumbing & Heating* 218 Mich. App. 302, 305-306; 553 N.W.2d 377 (1996). *See also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, (1966) ("Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.")[1]

20. Plaintiffs seek declaratory and injunctive relief requiring Secretary Benson to direct that election authorities comply with Michigan law mandating election inspectors from each party and allowing challengers access to video of ballot boxes before counting of relevant votes takes place.

21. The Michigan Constitution's "purity of elections" clause states, "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective

[1] Most United States Supreme Court rulings concerning the right to vote frame the issue in terms of the Equal Protection Clause. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance & Procedure* §18.31(a) (2012 & Supp. 2015).

franchise, and to provide for a system of voter registration and absentee voting." Const. 1963, art 2, §4(2).

22. "The phrase 'purity of elections' does not have a single precise meaning. But it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v. Detroit Election Comm.*, 854 N.W.2d 489, 504 (Mich. Ct. App. 2014).

23. Michigan statutes protect the purity of elections by allowing ballot challengers and election inspectors to monitor absentee ballots at counting boards.

24. Plaintiffs seek declaratory and injunctive relief requiring Secretary Benson to direct that election authorities comply with Michigan law mandating election inspectors from each party and allowing challengers access to video of ballot boxes before counting of relevant votes takes place.

25. MCL 168.765a, regarding Absent Voter Counting Boards, where absentee votes are processed and counted, states in relevant part as follows:

> At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed.

26. Michigan absent voter counting boards, under the authority of Secretary Benson. are not complying with this statute. These boards are being conducted without inspectors from each party being present.

IMMEDIATE ACTION AND AN EXPEDITED HEARING IS NECESSARY TO RESOLVE THIS VIOLATION OF MICHIGAN ELECTION LAW

27. Michigan Court Rule 2.605(D) authorizes this Court to "order a speedy hearing of an action for declaratory relief" and to "advance it on the calendar." The legal issues presented herein warrant an expedited hearing.

28. Expedited consideration of this matter is necessary because Secretary Benson is acting outside her constitutional and statutory authority and damaging the integrity of the November 3, 2020 general election.

29. If Secretary Benson's actions stand, a dangerous precedent will be set that deprives the voters of Michigan of a fair election.

30. Accordingly, it is imperative that this Court schedule an expedited hearing on these Michigan voters' Emergency Motion for Declaratory Judgment because, absent immediate relief, Secretary Benson's actions outlined above and in the Plaintiffs' Complaint will harm the integrity of the November 3, 2020 general election, and will deny Plaintiffs and all Michigan voters the right to a fair election.

31. This Court should schedule an expedited hearing to address the merits of these Michigan voters' motion. In conjunction with their request for a "speedy hearing" under MCR 2.605(D), we ask this Court to schedule oral argument under Local Rule 2.119(A)(6).

CONCLUSION

The Trump for President campaign and this Michigan citizen and voter ask this Court to order "a speedy hearing" of this action and "advance it on the calendar" as provided by MCR 2.605(D), mandate that Secretary Benson order all counting and processing of absentee votes cease immediately until an election inspector from each party is present at each absent voter counting board and until video is made available to challengers of each ballot box, and mandate that Secretary Benson order the immediate segregation of all ballots that are not being inspected and monitored as aforesaid and as is required under law.

Dated: November 4, 2020

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II
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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DONALD J. TRUMP, and
ERIC OSTERGREN

Plaintiffs,

v. Case No.:

JOCELYN BENSON, in her official
Capacity as SECRETARY OF STATE

Defendants.

BRIEF IN SUPPORT OF PLAINTIFFS' NOVEMBER 4, EMERGENCY MOTION FOR DECLARATORY JUDGMENT UNDER MCR 2.605(D)

For the reasons stated in the attached motion, Donald J. Trump and Eric Ostergren respectfully request that this Court grant their Emergency Motion for Declaratory Judgment under MCR 2.605(D).

Respectfully submitted,

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THE STATE OF MICHIGAN
COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC. and ERIC OSTERGREN,

Plaintiffs,

and

Democratic National Committee,

Intervening Plaintiff,

v.

JOCELYN BENSON, in her official capacity as the Michigan Secretary of State,

Defendant.

Civil Action No. 20-000225-MZ

HON. CYNTHIA STEPHENS

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**Pro hac vice motion forthcoming*

[11/04/2020] MOTION OF DNC TO INTERVENE AS PLAINTIFF

DNC respectfully requests that it be permitted to intervene as Plaintiff in this matter under Michigan Court Rule 2.209.

In support, DNC relies on the attached brief. Attached as Exhibit A is DNC's Proposed Complaint-in-Intervention, in accordance with Michigan Court Rule 2.209(C)(2).

Due to the urgency of this case, DNC asks the Court to promptly issue its ruling on this Motion. If this Motion is granted, Intervening Plaintiff will file immediately with the Court a properly verified complaint.

Respectfully submitted,

Dated: November 4, 2020

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PROOF OF SERVICE

Scott Eldridge certifies that on the 4th day of November 2020, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via email.

s/ *Scott Eldridge*
Scott Eldridge

EXHIBIT A

IN THE STATE OF MICHIGAN
COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC. and ERIC OSTERGREN, Plaintiffs, Democratic National Committee, Intervening Plaintiff, v. JOCELYN BENSON, in her official capacity as the Michigan Secretary of State, Defendant.	Civil Action No. 20-000225-MM HON. CYNTHIA STEPHENS

[PROPOSED] VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Intervenor-Plaintiff the Democratic National Committee ("DNC") files this Verified Amended Complaint for Declaratory and Injunctive Relief against Defendant JOCELYN BENSON, in her official capacity as the Michigan Secretary of State, and allege as follows:

NATURE OF THE CASE

1. Donald J. Trump for President, Inc. and Eric Ostergren (the "Trump Plaintiffs") filed this lawsuit to obstruct the counting process. In it, the Trump Plaintiffs ask the Court to stop the counting of all mail ballots and segregate those ballots that have already been cast. They do so based on specious claims that their rights to observe are being obstructed, devoid of factual allegations to support such claims.

2. The right to observe election day activity and exercises its attendant power to challenge voters is created and defined by statute. *Trump for President v Boockvar*, No. 20-cv-

966, 2020 WL 5997680, at *67 ("[T]here is no individual constitutional right to serve as a poll watcher.") (WD Pa, Oct. 10, 2020); *Pennsylvania Democratic Party v Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *30 (Pa, Sept. 17, 2020) (same); *Republican Party of Pennsylvania v Cortes*, 218 F Supp 3d 396, 413–14 (ED Pa 2016) (similar); Opinion and Order, *Polasek-Savage v Benson*, No. 20-000217-MM (Mich Ct Cl Nov 3, 2020) (similar); Order, *Kraus v Cegavske*, No. 20 OC 00142 (Nev Dist Ct, Oct. 29, 2020) *motion to stay denied*, No. 82018 (Nev Sup Ct, Nov. 03, 2020) (denying mandamus because petitioners including Donald J. Trump for President and others failed to cite any constitutional provision, statute, rule, or case that supports … request" for increased access to mail ballot processing and counting).

3. Michigan law allows registered voters in Michigan to serve as challengers. Challengers shall not make a challenge indiscriminately and without good cause. MCL § 168.727(3). A challenger may not "interfere with or unduly delay the work of the election inspectors." *Id.* In fact, it is a misdemeanor to challenge "a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters." *Id.* A challenge does not prevent a ballot from being counted. See Michigan Department of State Bureau of Elections, The Appointment, Rights and Duties of Election Challengers and Poll Watchers, at 10, https://www.michigan.gov/documents/SOS_ED_2_CHALLENGERS_77017_7.pdf.

4. Nevertheless through this action, the Trump Plaintiffs ask this Court to rewrite Michigan's challenger laws, under the auspices of a claim for an equal protection violation under the Constitution. The Trump Plaintiffs' claims are meritless. Moreover, should the Trump Plaintiffs be successful in using this action to obstruct the timely and lawful counting of ballots in Michigan or to otherwise slow the certification of the election in any way, it is the Intervening Plaintiff and its members, voters, and candidates with whom it affiliates whose equal protection

rights would be violated. Thus, for the reasons and those that follow, Intervening Plaintiff files this Complaint in Intervention to protect itself against irreparable constitutional injury in these proceedings.

JURISDICTION AND VENUE

5. The DNC brings this action under Article I, § 2 of the Michigan Constitution and MCR 2.605.

6. This Court has jurisdiction over the subject matter of this action pursuant to Michigan Compiled Laws § 600.6419.

7. This Court has personal jurisdiction over the Defendant Secretary of State Jocelyn Benson, who is sued in her official capacity only.

8. Venue is proper in the Court of Claims pursuant to Michigan Compiled Laws § 600.6419, because this is a constitutional and declaratory claim against the Secretary of State.

9. This Court has the authority to enter a declaratory judgment pursuant to Michigan Court Rule 2.605. It has authority to enter an injunction under the Michigan Constitution. *Sharp v City of Lansing*, 464 Mich 792 (2001).

PARTIES

10. Intervening Plaintiff DNC is the national party committee of the Democratic Party, as that term is defined by and used in 52 U.S.C. § 30101, dedicated to electing local, state, and national candidates of the Democratic Party to public office throughout the United States including in Michigan. The DNC has members and constituents across the State, including eligible voters who submitted absentee ballots in the November 3 election, and whose ballots have yet to be counted. The DNC also supports and affiliates with candidates whose electoral prospects, as well

as the Democratic Party's electoral prospects as well, stand to be harmed by the Trump Plaintiffs' baseless litigation.

11. Defendant JOCELYN BENSON is the Secretary of State of Michigan and is sued in her official capacity. Secretary Benson is Michigan's chief elections officer and, as such, has "supervisory control over local election officials in the performance of their duties." Mich. Comp. Laws § 168.21. In that role, she is specifically responsible for "[a]dvis[ing] and direct[ing] local election officials as to the proper methods of conducting elections." *Id.* § 168.31(1)(b). Secretary Benson is also tasked with overseeing voter registration, *e.g.*, *id.* §§ 168.496, 168.509o, including the automatic registration of voters who conduct business with her office to obtain a driver's license or state identification card. *Id.* § 168.493a. She, personally and through the conduct of her employees, officers, agents, and servants, acted under color of State law at all times relevant to this action.

CLAIMS FOR RELIEF

COUNT I

Michigan Const., Art. I, § 2
Denial of Equal Protection

12. The DNC realleges and incorporate by reference all prior and proceeding paragraphs, as though fully set forth herein.

13. The right to vote is a "fundamental political right . . . preservative of all rights," *Reynolds*, 377 U.S. at 562 (quoting *Yick Wo*, 118 U.S. at 370), that is protected by the Michigan Constitution. *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 479 Mich. at 35-36.

14. Article I, § 2 of the Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws."

15. Having adopted a system by which absentee voting is available to all voters, Michigan may not "by later arbitrary and disparate treatment, value one person's vote over that of another." *Obama For Am v Husted*, 888 F Supp 2d 897, 910 (SD Ohio, 2012), *aff'd*, 697 F3d 423 (CA 6, 2012); *Bush v Gore*, 531 US 98, 104–05 (2000) (holding Equal Protection Clause applies to "the manner of [the] exercise [of voting]" and "once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another").

16. All Michigan voters who cast lawful absentee ballots should have equal access to having their vote counted, which the Michigan Constitution provides.

17. The Trump Plaintiffs seek relief that would jeopardize this right. Segregating ballots treats some voters differently from others.

18. The State does not have even a legitimate, much less a compelling, interest in the disparate treatment of similarly situated voters. See *Obama for America*, 888 F Supp 3d 897, 910 (holding a state had no compelling interest in setting an in-person early voting deadline, which valued the rights of military voters over nonmilitary voters).

19. Any order by Defendant to stop the counting of ballot, as the Trump Plaintiffs demand, would amount to a violation of Michigan's Equal Protection guarantee.

20. Absent relief, therefore, Michigan voters, including the DNC's members, will be denied an equal opportunity to participate in Michigan's elections.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

(a) declaring that the counting of absentee ballots must continue;

(b) declaring that any action by Defendant to stop the counting of ballots will result in a violation of Michigan's Equal Protection Clause;

(c) enjoining Defendant from issuing an order or instruction of any kind to stop the counting of ballots, as requested by the Trump Plaintiffs; and

(b) granting such other and further relief as the Court deems just and proper.

Dated this 4th day of November, 2020.

Respectfully submitted,

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Counsel for Plaintiffs
**Pro hac vice motion forthcoming*

VERIFICATION

"I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief."

Date: _____ [name]

IN THE STATE OF MICHIGAN
COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC. and ERIC OSTERGREN, Plaintiffs, Democratic National Committee, Intervening Plaintiff, v. JOCELYN BENSON, in her official capacity as the Michigan Secretary of State, , Defendant.	Civil Action No. 20-000225-MZ HON. CYNTHIA STEPHENS

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[11/04/2020] BRIEF IN SUPPORT OF 11/04/2020 MOTION OF DNC TO INTERVENE AS PLAINTIFF

Intervening Plaintiff DNC moves to intervene as a plaintiff in this suit filed by Plaintiffs Donald J. Trump for President, Inc. and Eric Ostergren (together, the "Trump Campaign"). Through this lawsuit, the Trump Campaign seeks to disrupt the lawful counting of ballots in Michigan, which impairs DNC's distinct and protectable legal interests. Specifically, any challenge or change to the State's policy for public observation of the ballot tabulation process will unquestionably impact DNC's operations and impair its constitutional rights. DNC's immediate intervention to protect those interests is warranted.

Intervention is governed by Michigan Court Rule ("MCR") 2.209:

> (A) **Intervention of Right.** On timely application a person has a right to intervene in an action . . . (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless applicant's interest is adequately represented by existing parties.
>
> (B) **Permissive Intervention.** On timely application a person may intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

"The rule for intervention should be liberally construed to allow intervention where the applicant's interests may be inadequately represented." *Neal v Neal*, 219 Mich App 490, 492 (1996); see also *State Treasurer v Bences*, 318 Mich App 146, 150 (2016).

Here, DNC readily satisfies the requirements for intervention of right under MCR 2.209(A). MCR 2.209(A)(3) requires "timely application, a showing that the representation of the applicant's interests by existing parties is or may be inadequate, and a determination whether disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect his interests Its motion for intervention follows." *Chvala v Blackmer*, unpublished opinion of the Court of Appeals, issued January 16, 2001 (Docket No 221317), 2001 WL 789526, p *2, (citing *Oliver v State Police Dep't*, 160 Mich App 107, 115 (1987)).

First, its application is timely because it follows within hours of the filing of this suit, before any significant action has been taken. *See, e.g.*, *Karrip v Cannon Tp*, 115 Mich App 726, 731 (1982).

Second, DNC possesses interests that will likely be impaired or impeded by this action. DNC is a national political committee as defined in 52 U.S.C. § 30101 that is, among other things, dedicated to electing local, state, and national candidates of the Democratic Party in Michigan. Specifically, DNC "contend[s] that [its] conduct, as well as that of [the Trump Campaign], [i]s intended to be regulated by [Defendant] and that [it is] subject to the same enforcement risks as" the Trump Campaign. *Associated Builders & Contractors v Wilbur*, unpublished opinion of the Circuit Court, issued December 15, 2000 (Docket No 00-2512-CL-L), 2000 WL 35737131, p *47 (contingently granting intervention). Like the Trump Campaign, DNC is a political party that has an interest in observing vote tabulation and ensuring the integrity of the election process. Because its ability to conduct such observation will be impacted by this suit, it has readily satisfied this requirement. Moreover, if the Trump Campaign successfully stops the tabulation, then the rights of DNC and its members—including the right to vote and the right to due process—will be violated.

Third, no current party adequately represents DNC's interests. The Trump Campaign is indisputably opposed to DNC's electoral performance in Michigan, while Defendant cannot be relied upon to safeguard DNC's ability to observe the tabulation process on equal grounds as the Trump Campaign. See, e.g., *Estate of Lyle v Farm Bureau Gen Ins Co of Mich*, unpublished opinion of the Court of Appeals, issued September 19, 2019 (Docket No 343358), 2019 WL 4555993, p *7 (affirming intervention and noting that where "concern of inadequate representation

of interests . . . . exists, the rules of intervention should be construed liberally in favor of intervention" (quoting *Vestevich v W Bloomfield Twp*, 245 Mich App 759, 762 (2001)).

In the alternative, DNC should be granted permissive intervention under MCR 2.209(B)(2). That rule provides for permissive intervention where a party timely files a motion and the party's "claim or defense and the main action have a question of law or fact in common." MCR 2.209(B)(2). "[T]he trial court has a great deal of discretion in granting or denying [permissive] intervention." *Mason v Scarpuzza*, 147 Mich App 180, 187 (1985); *see also City of Holland v Dep't of Nat Res & Envt*, unpublished opinion of the Court of Appeals, issued March 1, 2012 (Docket No. 302031), 2012 WL 676356, p *3. As discussed above, DNC's motion is timely, and DNC is entitled to the same statutory right to observe the tabulation of votes as the Trump Campaign.

For the foregoing reasons, DNC respectfully asks this Court to grant its motion to intervene.

Respectfully submitted,

Dated: November 4, 2020

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**Pro hac vice motion forthcoming*

PROOF OF SERVICE

Scott Eldridge certifies that on the 4th day of November 2020, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via email.

s/ *Scott Eldridge*
Scott Eldridge

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT INC., and ERIC OSTERGREN,

Plaintiffs,

v. Case No. 20-000225-MZ

JOCELYN BENSON, in her official Capacity as SECRETARY OF STATE

Defendant.

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Counsel for Plaintiffs

PLAINTIFFS' NOTICE OF SUPPLEMENTAL EVIDENCE IN SUPPORT OF THEIR COMPLAINT AND MOTION FOR EMERGENCY INJUNCTIVE RELIEF

Donald J. Trump for President, Inc., and Eric Ostergren provide the attached witness statement describing significant, substantial, and severely troubling election irregularities at the TCF Center ballot processing location in Wayne County, Michigan. This affidavit describes how Wayne County election authority workers are changing the date absent voter ballots are received. See **Exhibit A** (Affidavit of Jessica Connarn).

Jessica Connarn's affidavit describes how an election poll worker told Jessica Connarn that the poll worker "was being told to change the date on ballots to reflect that the ballots were received on an earlier date." *Id.* ¶1. Jessica Connarn also provided a photograph of a note handed to her by the poll worker in which the poll worker indicated she (the poll worker) was instructed to change the date ballots were received. *See id.*

The Trump campaign and Eric Ostergren file this notice and the accompanying affidavit and photograph supporting our request that this Court order all counting and processing of absent voter ballots cease until the election authority complies with Michigan law allowing designated challengers to meaningfully observe the election inspectors' processing of the ballots.

Dated: November 4, 2020

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II
Mark F. (Thor) Hearne, II (P40231)
Stephen S. Davis (*pro hac* pending)
TRUE NORTH LAW, LLC
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Counsel for Plaintiffs

EXHIBIT A

STATE OF MICHIGAN
COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 20-000225-MZ
SECRETARY OF STATE JOCELYN BENSON,	)	
Defendant.	)	

AFFIDAVIT OF JESSICA CONNARN

I, Jessica Connarn, being first duly sworn, depose and state the following:

1. I was working as the attorney acting as poll challenger with the Michigan Republican Party in a designated area of zone 12-15 when I was approached by a Republican Party poll challenger, who stated that a hired poll worker of the TCF Center, in Wayne County, Michigan, was nearly in tears because she was being told by other hired poll workers at her table to change the date the ballot was received when entering ballots into the computer.

2. When I approached the poll worker, she stated to me that she was being told to change the date on ballots to reflect that the ballots were received on an earlier date. I went to inform a supervisor of this, and I was asked to get the poll worker's name. When I went back to the poll worker's table, I was yelled at by the other poll workers working at her table, who told me that I needed to go away and that I was not allowed to talk to the poll worker with whom I spoke earlier. The poll worker slipped me a note that read "entered receive date as 11/2/20 on 11/4/20." I have attached a photograph I took of this note as Exhibit 1.

3. Based upon what I was told by this poll worker, I believe that poll workers working at the adjudication table were changing the dates ballots were received.

4. I was told to obtain a photo of the poll worker and upon returning to see if the poll worker was still at her location, I noticed the poll worker was moved up on to the adjudication stage where we were not able to communicate with her.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of November, 2020.

Jessica Connarn
JESSICA CONNARN

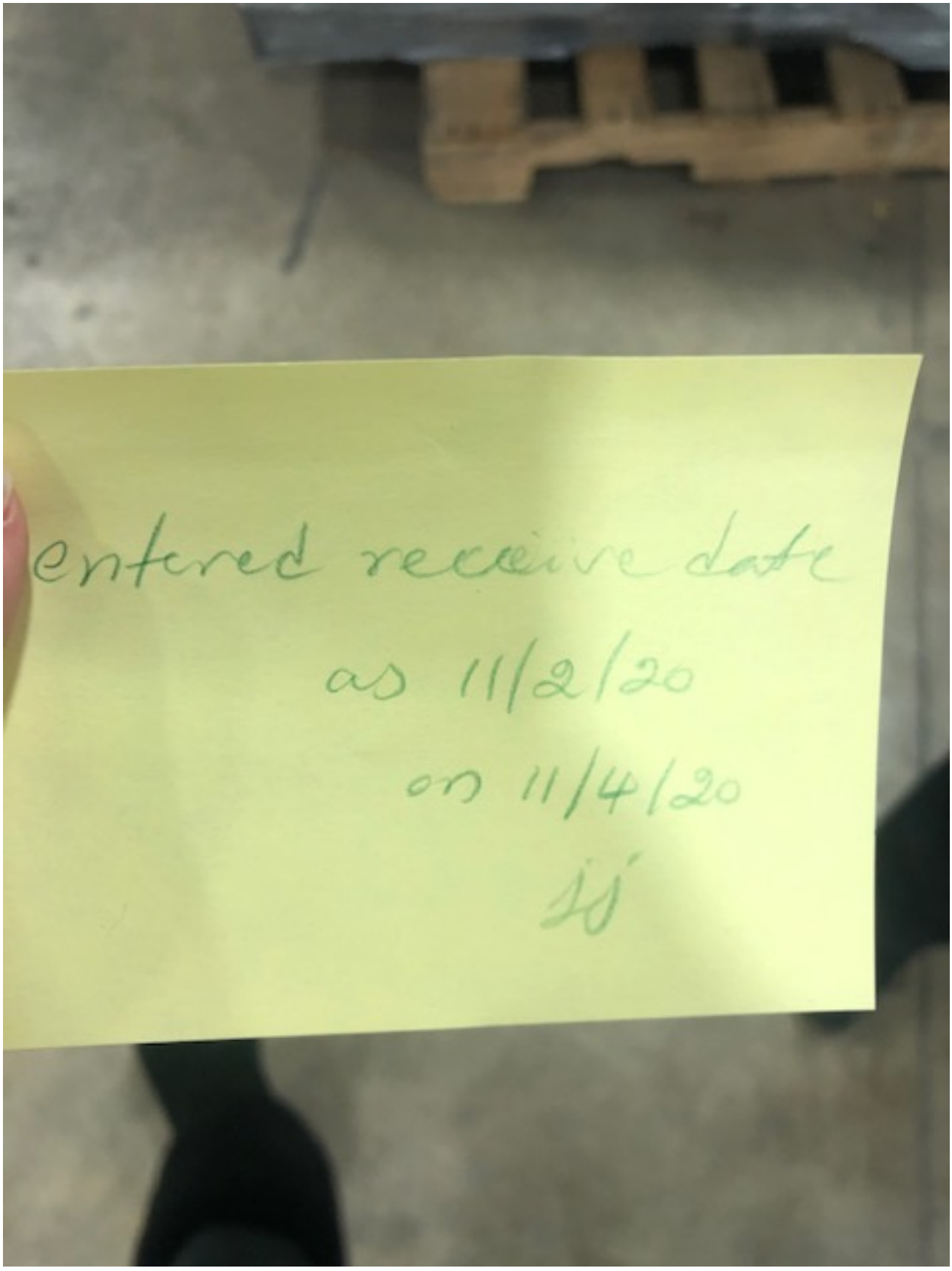
Subscribed and sworn to before me this 4th day of November, 2020.

Paul Gibron
Notary Public

Wayne County, Michigan

My Commission Expires: July 2021 11/4/2020

PAUL GIBRON



STATE OF MICHIGAN
COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC., and
ERIC OSTERGREN

Plaintiffs,

v. Case No.: 20-000225-MZ

JOCELYN BENSON, in her official Capacity as SECRETARY OF STATE

Defendants.

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Counsel for Plaintiffs

RESPONSE IN OPPOSITION TO THE DEMOCRATIC NATIONAL COMMITTEE'S MOTION TO INTERVENE

The Trump presidential campaign and Michigan voter and credentialed election challenger Eric Ostergren ask this Court to deny the Democratic National Committee's motion to intervene. The Democratic National Committee (DNC) has no standing or right to intervene. To the extent the DNC has any interest in the outcome of this litigation, the DNC's interest is adequately represented. This is an election case and the DNC's intervention will only serve to delay the resolution of this important election litigation and the Plaintiffs' interest in protecting the rights of Michigan voters to participate in a fair, just, and transparent election.

This Court should deny the DNC's motion to intervene under MCL 600.6419 and *Council of Organizations v. State*, 909 N.W.2d 449 (Mich. Ct. App. 2017). In *Council of Organizations*, the Michigan Court of Appeals held this Court does not have jurisdiction over a non-state-actor, and therefore, a non-state party could not intervene in litigation pending before this Court. *Id.* at 469-70. In *Council of Organizations*, the Court held that because "Plaintiffs are raising no claims against any of the state legislators for allegedly wrongful conduct during which they were acting, or reasonably believed that they were acting, within the scope of their 'authority while engaged in or discharging a government function in the course of [their] duties,'" this Court lacked jurisdiction over their claims, and the motion to intervene was properly denied. *Id.* at 470.

This Court recently followed *Council of Organizations* and denied the Republican National Committee's motion to intervene in an election-related lawsuit against Secretary Benson. *Michigan Alliance for Retired Americans v. Benson*, No. 20-000108-MM, Opinion and Order of July 14, 2020. In doing so, this Court stated that the Republican National Committee and the Michigan Republican Party "are non-state entities that seek to intervene as defendants in this matter…." *Id.* at 1. This Court held that the "Court is bound by this published decision…and therefore it must deny the motion to intervene." *Id.* (citing *Council of Organizations*, 909 N.W.2d at 449, and MCR 7.215(C)(2)). Likewise, the DNC's motion here should be concomitantly denied.

The DNC tries to sidestep the holding of *Council of Organizations* and this Court's decision in *Michigan Alliance* by attempting to intervene as a plaintiff instead of a defendant. But that is a distinction without a difference. The DNC cannot skirt Michigan statutes and the settled authority of this Court and Michigan's superior courts.

The DNC's motion is contrary to the Court of Appeals' decision in *Council of Organizations*. If the Court grants the DNC's motion to intervene on the basis that the DNC styled

themselves a "plaintiff" instead of a "defendant" it would render this Court's and the Court of Appeals' rulings meaningless because any private party could escape the rule set forth in *Council of Organizations* through artful pleading.

The Court should also deny the DNC's motion to intervene because, in seeking to intervene as a co-plaintiff, the DNC's motion improperly seeks to simply deny the relief the Trump campaign and an election challenger are seeking. The DNC is seeking the opposite relief of the plaintiffs in this case. See Exhibit A ¶19 to DNC's motion to intervene ("Any order by Defendant to stop the counting of ballot [*sic.*], as the Trump Plaintiffs demand, would amount to a violation of Michigan's Equal Protection guarantee."). See also *id.* (prayer for relief). To intervene as a plaintiff the DNC would need to affirm the relief the Trump Campaign Plaintiffs have sought – *i.e.*, allowing credentialed challengers to meaningfully oversee the conduct of the election as provided by Michigan's Election Code and Constitution. But that is not what the DNC seeks. The DNC wants this Court to deny the relief the Trump campaign and Michigan voter and challenger Eric Ostergren seek – to meaningfully monitor the conduct of this election.

The DNC claims "no current party adequately represents DNC's interests." DNC brief in support of motion, p. 3. But then the DNC claims the "Trump Campaign is indisputably opposed to DNC's electoral performance in Michigan, while Defendant cannot be relied upon to safeguard DNC's ability to observe the tabulation process on equal grounds as the Trump Campaign." *Id.* The DNC cannot run with the fox and hunt with the hounds. The DNC cannot have it both ways.

First the DNC claims Defendant Democratic Secretary of State Jocelyn Benson "cannot be relied upon to safeguard DNC's ability to observe the tabulation process on equal grounds." DNC brief in support of motion, p. 3. But Secretary of State Benson is an elected *Democrat*. Who better than the Democratic Secretary of State to represent the interests of the Democratic Party? The

plaintiffs are asking this Court to order Secretary Benson to assure that *bipartisan* teams of election inspectors (both a Democrat and a Republican) are processing absent voter ballots and that challengers with the Trump campaign may meaningfully participate. Therefore, all parties, both the Trump campaign and defendant Secretary Benson, are asking for the relief the DNC seeks to intervene to obtain.

The Trump campaign and this Michigan voter and election challenger have asked this Court to order "a speedy hearing" of this action because time is of the essence. This Court should deny the DNC's motion and require Secretary Benson to order all counting and processing of absentee votes stop until an election inspector from each party (both Democrat and Republican) is present at each absent voter counting board and to provide the Trump campaign an opportunity to allow Eric Ostergren and other certified challengers to meaningfully monitor the processing of the ballots. We also ask that Secretary Benson order the immediate segregation of all ballots that are not subject to meaningful monitoring by the challengers appointed by the Trump campaign and other qualified observers as provided by Michigan law.

Dated: November 4, 2020

Respectfully submitted,

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STATE OF MICHIGAN

COURT OF CLAIMS

DONALD J. TRUMP, and ERIC OSTERGREN,

Plaintiffs,

v

Case No. 20-000225-MZ

JOCELYN BENSON, in her official capacity as SECRETARY OF STATE,

Hon. Cynthia Diane Stephens

Defendant.

_____/

ORDER

Currently pending before this Court is Plaintiff's 11/04/2020 Emergency Motion for Declaratory Judgment;

That Complaint was NOT accompanied by a Motion for a Temporary Restraining Order either with or without notice, a Motion for Preliminary Injunction, or any affidavit.

The Democratic National Committee filed a Motion to Intervene after business hours on Wednesday, November 04, 2020. The Plaintiffs filed a Motion for Emergency Injunctive Relief on Thursday, November 05, 2020 along with opposition to the request to intervene. They also filed an affidavit from Ms. Connarn. No proof of service has been filed.

IT IS HEREBY ORDERED that because of the grave importance of the issues in this matter and despite the failure of the plaintiff to file proofs of service, that the proposed intervenors may file an amicus brief on or before noon while this court reviews the Motion to Intervene.

The Court further orders that the parties and the proposed intervenors appear today Thursday, November 05, 2020 at 11:30 a.m. via zoom for a hearing on all matters.

IT IS SO ORDERED.

Dated: November 05, 2020

Cynthia Diane Stephens, Judge
Court of Claims

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC., and ERIC OSTERGREN,

Plaintiffs,

v. Case No. 20-000225-MZ

JOCELYN BENSON, in her official Capacity as SECRETARY OF STATE

Defendants.

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Counsel for Plaintiffs

PROOF OF SERVICE

The undersigned certifies that on November 4, 2020, he served the following: ***Plaintiffs' Complaint, Plaintiffs' November 4, 2020 Motion for Emergency Injunctive Relief,*** and ***Plaintiffs' Notice of Supplemental Evidence*** via email to Erik A. Grill, Assistant Attorney General, Civil Litigation, Elections, & Employment Division at grille@michigan.gov, and Heather Meingast, Assistant Attorney General, at meingasth@michigan.gov.

Dated: November 5, 2020

/s/ Stephen S. Davis
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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC., and ERIC OSTERGREN,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant.

No. 20-000225-MZ

HON. CYNTHIA STEPHENS

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/

DEFENDANT SECRETARY OF STATE'S RESPONSE TO PLAINTIFFS' NOVEMBER 4, 2020 EMERGENCY MOTION FOR DECLARATORY JUDGMENT UNDER MCR 2.605(D)

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Attorney General

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Dated: November 5, 2020

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether Plaintiffs have failed to establish that they are entitled to declaratory judgment?

INTRODUCTION

Plaintiffs attempt to "unring" a bell in this case. They ask this Court to halt the counting and processing of absent voter ballots throughout the State of Michigan. But the tally of unofficial county results is complete. This means that absent voter ballots have already been processed and counted in the State of Michigan. The relief they seek can no longer be granted. And regardless, Plaintiffs' substantive claims are entirely without merit, if not frivolous.

Plaintiffs argue that the Michigan Election Law and state Constitution were violated when election inspectors from each major political party was not present for the counting and processing of absent voter ballots at absent voter counting boards. But Plaintiffs do not identify any jurisdiction in which this purported irregularity occurred or set forth any facts supporting their assertions. Plaintiffs further argue that challengers should have the opportunity to review video surveillance footage of drop boxes into which absent voter ballots were placed before those ballots can be counted. But the law does not provide for any such right or opportunity, and the time for pressing this claim has long since passed.

Even a cursory review of Plaintiffs' filings demonstrates that their vague legal claims and nonexistent facts hold no water and should be dismissed.

COUNTER-STATEMENT OF FACTS

Late in day on November 4, Plaintiffs Donald J. Trump for President, Inc., and Eric Ostergren filed the instant complaint for declaratory judgment along with a motion for emergency declaratory relief under MCR 2.605(D).

Their claims revolve around the duties of election inspectors and the use of drop boxes for the return of completed absent voter ballots.

A. Election Inspectors

For Election Day, city or township election commissioners must appoint at least three election inspectors to each election precinct, and "not less than a majority of the inspectors shall be present in the precinct polling place during the time the polls are open." MCL 168.672. While three are required, a commission can appoint as many inspectors as are needed "for the efficient, speedy, and proper conduct of the election." MCL 168.674(1). This is true for the absent voter counting boards (AVCB) associated with the precincts as well, and the inspectors appointed to AVCBs have the same authority as election inspectors at in-person voting precincts. MCL 168.765a(1), (4).[1] The election commissioners "shall designate 1 appointed election inspector as chairperson," and "shall appoint at least 1 election inspector from each major political party and shall appoint an equal number, as nearly as possible, of election inspectors in each election precinct from each major political party." MCL 168.674(2). With respect to AVCBs, section 765a provides that "[a]t all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed." MCL 168.765a(10).

While the Secretary exercises supervisory control over local election officials, including inspectors, see MCL 168.21, election inspectors have primary supervisory authority over polling places and AVCBs on Election Day. Section 678 provides that "[e]ach board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during any . . . election[.]" MCL 168.678.

[1] Not every jurisdiction chooses to establish AVCBs for the processing and counting of AV ballots. MCL 168.765a(1) ("if a city or township decides to use absent voter counting boards").

B. Absent voter ballot "drop boxes"

The use of a secure "drop box" for returning completed absent voter (AV) ballots to local clerks is not new in Michigan. Many jurisdictions have made such drop-boxes available for collecting AV ballots, tax returns, payments, and other government-related documents for many years. It is not significantly different from voters dropping their completed AV ballots into a mailbox for delivery by the postal service.

In October, the Michigan Legislature enacted Public Act 177 of 2020, which became immediately effective on October 7, 2020.[2] That Act amended the Election Law to include new provisions relating to drop boxes. Section 761d provides:

> (1) Except as otherwise provided in this subsection and subsection (2), if an absent voter ballot drop box was ordered or installed in a city or township before October 1, 2020, that absent voter ballot drop box is exempt from the requirements of this section. Subsection (5) applies to an absent voter ballot drop box described in this subsection.
>
> (2) If an absent voter ballot drop box was ordered, but not installed in, a city or township before October 1, 2020, the clerk of that city or township must make every reasonable effort to have that absent voter ballot drop box comply with the requirements of this section.
>
> (3) An absent voter ballot drop box must meet all of the following requirements:
>
> (a) Be clearly labeled as an absent voter ballot drop box.
>
> (b) Whether located indoors or outdoors, be securely locked and be designed to prevent the removal of absent voter ballots when locked.
>
> (c) If located in an area that is not continuously staffed, be secured to prevent the removal of the absent voter ballot drop box from its location.
>
> (4) **If an absent voter ballot drop box is located outdoors, all of the following apply:**

[2] See legislative history for PA 177 available at http://www.legislature.mi.gov/(S(efzafixkse3uambsaldsph34))/mileg.aspx?page=getObject&objectName=2020-SB-0757.

(a) The drop box must be securely locked and bolted to the ground or to another stationary object.

(b) The drop box must be equipped with a single slot or mailbox-style lever to allow absent voter ballot return envelopes to be placed in the drop box, and all other openings on the drop box must be securely locked.

(c) **The city or township clerk must use video monitoring of that drop box to ensure effective monitoring of that drop box.**

(d) The drop box must be in a public, well-lit area with good visibility.

(e) The city or township clerk must immediately report to local law enforcement any vandalism involving the drop box or any suspicious activity occurring in the immediate vicinity of the drop box.

(5) Only a city or township clerk, his or her deputy clerk, or a sworn member of his or her staff, is authorized to collect absent voter ballots from an absent voter ballot drop box. [MCL 168.761d(1)-(5) (emphasis added).]

Under these provisions, if a jurisdiction ordered or installed a drop box before October 1, the jurisdiction is not mandated to comply with the new requirements, such as the video monitoring requirement. But if a jurisdiction had not yet installed a drop box before October 1, the jurisdiction is required to make every reasonable effort to have the drop box comply with the new provisions.

Notably, the Legislature did not include any requirement that local clerks keep track of, or segregate, which AV ballots were returned via a drop box. Nor did the Legislature provide that any recording of the video monitoring of a drop box be made available to anyone, including poll challengers.

ARGUMENT

I. Plaintiffs fail to demonstrate that they are entitled to any declaratory relief against the Secretary of State and their emergency motion for such relief must be denied.

This Court should exercise its discretion and deny Plaintiffs' request for emergency declaratory relief where Plaintiffs' claims are barred by laches, Plaintiffs lack standing to bring their suit, and where Plaintiffs' constitutional and statutory claims are devoid of merit.

A. Standard of review.

MCR 2.605 governs a trial court's power to enter a declaratory judgment. The court rule provides, in pertinent part, that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record *may* declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1) (emphasis added). The language in this rule is permissive, and the decision whether to grant declaratory relief is within the trial court's sound discretion. *P.T. Today, Inc v Comm'r of Office Fin & Ins Servs*, 270 Mich App 110, 126 (2006).

B. Plaintiffs' claims must be dismissed because they are barred by laches.

"The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Charter Twp of Lyon v Petty*, 317 Mich App 482, 490 (2016) (quotation marks and citation omitted). "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Id.* (citation omitted). To merit relief under this doctrine, the complaining party must establish prejudice as a result of the delay. *Id*. (citations omitted). Proof of prejudice is essential to the defense of laches. *Id*. In this case, the delay by Plaintiffs in raising their claims has prejudiced the ability of the Defendants to respond or even to comply with the relief they request.

First, Plaintiffs unreasonably delayed raising their claims before this Court. AV ballots became available to voters on September 24, 2020. Const 1963, art 2, § 4(1). Since that date and through 8 p.m. on Election Day, voters could have completed and returned their AV ballots via their local jurisdiction's drop box. The polls opened at 7 a.m. on Election Day, and AVCBs began processing and counting all AV ballots at 7 a.m.,[3] whether the ballots were returned by mail, in person, or by drop box, and many AVCBs continued to do so after the polls closed at 8 p.m. and into the night and the next day, November 4.

The new requirement for video monitoring of drop boxes became effective on October 7, and Plaintiffs can be charged with notice of that enactment. If they believe that challengers should have access to surveillance video, the time to bring that claim was October 8—not the day after the election, and after the majority of AV ballots have been counted in this State.

Plaintiffs' claims regarding missing election inspectors are also untimely. Again, Plaintiffs do not identify a single jurisdiction in which an election inspector of each political party was not present at an AVCB or identify a date or time at which the alleged incidents occurred. And Plaintiffs make no effort to explain how or why their complaint was timely filed. Given that the AVCBs and the election inspectors appointed to oversee them have now completed their tasks, Plaintiffs' claims are too late.

Second, the Secretary of State has been prejudiced by the Plaintiffs' delay in bringing their claims. There is or was no way the Secretary could have directed local clerks to provide video footage of drop boxes they may have to challengers at AVCBs in their jurisdictions after the filing of Plaintiffs' complaint late in the day on November 4. Similarly, since Plaintiffs'

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[3] Some jurisdictions began pre-processing AV ballots under an amendment to the Michigan Election Law that permitted limited processing activities prior to Election Day. See MCL 168.765(6). Challengers were permitted to observe these pre-processing activities. *Id.*

complaint and motion did not identify any specific AVCBs that were missing an inspector, the Secretary could not have assisted in remedying that situation. Of course, this is especially true now since the unofficial county count is complete. (Ex A, Brater Dec, ¶ 8.)

In *New Democratic Coal v Austin*, 41 Mich App 343, 356–357 (1972), the Court of Appeals observed in that apportionment case:

> We take judicial notice of the fact that elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws. The state has a compelling interest in the orderly process of elections. Courts can reasonably endeavor to avoid unnecessarily precipitate changes that would result in immense administrative difficulties for election officials. In this case to grant the relief requested by the plaintiffs would seriously strain the election machinery and endanger the election process. [citation omitted.]

Federal courts have also long recognized that delays in bringing a challenge to election rules are inevitably prejudicial and pose special risks. *See, e.g.*, *Republican Nat'l Comm v Democratic Nat'l Comm*, 140 S Ct 1205, 1207 (2020) (per curiam); *Purcell v Gonzalez*, 549 US 1, 4-5 (2006)(per curiam). In *Crookston v Johnson,* 841 F3d 396, 398 (CA 6, 2016), the Sixth Circuit stayed an injunction affecting Michigan's election procedures, and the reasoning could just as readily apply in this case:

> There are many reasons to grant the stay. The first and most essential is that Crookston offers no reasonable explanation for waiting so long to file this action. When an election is "imminen[t] and when there is "inadequate time to resolve [] factual legal disputes" and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures. See *Purcell v Gonzalez*, 549 US 1, 5-6 [ ] (2006) (per curiam). That is especially true when a plaintiff has unreasonably delayed bringing his claim, as Crookston most assuredly has. . . . Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.

The U.S. Supreme Court recently reaffirmed that principle in *Republican Nat'l Comm*, 140 S Ct at 1207 (staying portions of an injunction modifying process for mailing ballots on eve of primary election).

Here, Plaintiffs unreasonably delayed in raising these claims before this Court, and the consequences of their delay prejudiced the Secretary of State. Plaintiffs' claims are barred by laches.[4]

C. Plaintiffs' claims must be dismissed because they lack standing to bring the claims alleged in their complaint.

The Michigan Supreme Court re-established principles of prudential standing in *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372 (2010), where it held:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

So, if there is no legal cause of action, the plaintiff must meet the requirements of MCR 2.605, which provides that "[i]n a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment[.]"

Pursuant to MCR 2.605, "[t]he existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Lansing Sch Educ Ass'n v Lansing Bd of Educ*

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[4] Even if laches did not bar Plaintiffs' claims, their claims should be dismissed because they are moot. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy." *Gen Motors Corp v Dep't of Treasury,* 290 Mich App 355, 386 [ ] (2010) citation omitted). Here, elections inspectors, challengers, and AVCBs have all completed their duties with respect to the November 3, general election, and AV ballots have been counted. There is no more counting of ballots for election inspectors and challengers to oversee and observe and no counting of ballots to halt. It is now impossible for the Court to grant Plaintiffs' requested relief, and any judgment would have no practical legal effect.

(*On Remand*), 293 Mich App 506, 515 (2011) (citation omitted). "An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." 293 Mich App at 515 (citing *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43, 55 (2000)). "The essential requirement of the term actual controversy under the rule is that plaintiffs plead and prove facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) (citation and internal quotation marks omitted). "Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense*, 243 Mich App at 55. A litigant may also have standing in this context if they have a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. *Lansing Sch Educ Ass'n*, 487 Mich at 372.

Plaintiffs here fail each of these requirements. First, they have not articulated any legal causes of action in their complaint. Second, they have not demonstrated that they meet the requirement of an actual controversy that would support a declaratory judgment. Here, Plaintiffs' complaint requests that this Court declare that the Secretary of State, herself, has violated the Constitution's Equal Protection Clause, Purity of Elections Clause, and MCL 168.765a. But Plaintiffs do not require a declaration that the Secretary "violated" the Michigan Constitution or the statute in order to guide their future conduct. Indeed, Plaintiffs have failed to pled the existence of an actual controversy in this case where they have not identified a single jurisdiction, election inspector, or challenger, that was aggrieved by any failure of the Secretary to act. The alleged harms appear hypothetical or speculative.

Plaintiffs' late-filed affidavit of Jessica Connarn does not demonstrate otherwise. Ms. Connarn affirms that she was acting as a Republican challenger at the City of Detroit's AVCB, when she was approached by an unidentified, distressed poll worker who told Connarn that she was being directed to change the received-by date on an AV ballot, and that the upset worker did, in fact, change a date on a ballot, as allegedly demonstrated by a picture of a sticky note. (Connarn Aff, ¶P 1-2.) Connarn affirms that she went to report this matter to a "supervisor," was told to get the name or picture of the poll worker, but then could not do so because the poll worker had moved to work at an adjudication table. *Id*., ¶¶ 2, 4. Setting aside the multiple factual and evidentiary infirmities that undermine the credibility of the affidavit, its substance is unrelated to the claims pending here. The affiant does not declare that election inspectors of a particular party were absent from Detroit's AVCB, nor does she allege that, as a challenger, she requested to see Detroit's drop box videos and was denied access, nor does she express any need or interest in viewing such videos. As a result, there is no case or controversy that would support a declaratory judgment.

Lastly, Plaintiffs have not identified any special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large.

The Trump committee alleges that it "has a special and substantial interest in assuring that Michigan processes the ballots of Michigan citizens [sic] according to Michigan law so that every lawful Michigan voter's ballot is fairly and equally processed and counted." (Comp., ¶ 6.) In other words, the Trump committee has an interest in Michigan following the law. But that is an interest shared by every citizen in Michigan and does not set the Trump committee apart for purposes of establishing standing.

Plaintiff Ostergren alleges that he is a registered voter of Roscommon County and is "credentialed and trained as an election 'challenger.' " (Comp., ¶ 2.) He does not allege who he is a challenger for, i.e., a major political party or some other organization. He alleges he "was excluded from the counting board during the absent voter ballot review process." *Id.* But he does not identify from which ACVB he was excluded. He further alleges that he "has a special and substantial interest under Michigan law as a credentialed election challenger to observe the processing of absent voter ballots." *Id.*, ¶ 6. But these allegations bear little relationship to the claims alleged here. Again, the claim here is that election inspectors were missing from AVCBs, not that credentialed challengers were excluded. As to the claim regarding drop box videos, like Connarn, Ostergren does not allege that, as a challenger somewhere, he requested to be shown the surveillance video and was denied. He does not even specifically allege that he is or was interested in observing videos. Ostergren has not demonstrated any special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large to support his standing to bring this complaint.

As a result, Plaintiffs lack standing to bring the claims in the complaint, and their motion for declaratory judgment should be denied.

D. Plaintiffs are not entitled to a declaratory judgment because their constitutional and statutory claims fail on the merits and must be dismissed.

Plaintiffs' complaint raises three counts, in which they allege that the lack of opportunity for challengers at AVCBs to observe security video footage of ballot drop boxes (1) violates the Equal Protection Clause of the Michigan Constitution; (2) violates "Michigan voters'" rights under the purity of elections clause of the Michigan Constitution; and (3) violates MCL 168.765a. But none of these claims has any legal merit.

Plaintiffs' minimal allegations include only two principal claims. First, they allege that, "Michigan [AVCBs] are not complying with [MCL 168.765a]" because the boards, "are being conducted without inspectors from each party being present." (Complaint, ¶11). This allegation is entirely unsupported by any factual allegations. Plaintiffs do not identify any AVCBs that allegedly do not or did not have an election inspector from each of the major parties. The only allegation that comes close to addressing this claim is that Plaintiff Ostergren was "excluded from the counting board during the absent voter ballot review process." (Complaint, ¶2). However, again, there is no allegation of what AVCB was involved, or when this allegedly occurred.

Moreover, Plaintiff Ostergren does not allege that he was an election inspector—he alleges only that he was credentialed as an election *challenger*. (Complaint, ¶2). But a challenger is not the same thing as an inspector—they are appointed in different manners and have different responsibilities. Compare e.g. MCL 168.674 and MCL 168.730. Indeed, one of a challenger's duties is to bring issues to the attention of an election inspector. MCL 168.733(1)(e). Plaintiff Ostergren's alleged exclusion, therefore, does nothing to support a violation of MCL 168.765a. As a result, there is no allegation in the complaint to support the conclusion that inspectors have been excluded from anything. In contrast, Defendant Benson has provided the declaration of Director of Elections Jonathan Brater, which states in part that election inspectors *have* been appointed and present in each precinct and that no complaints have been received by the Bureau of Elections from any election inspector asserting that they have been excluded from a counting board. (Ex A, Brater dec, ¶ 10). Plaintiffs simply fail to make allegations sufficient to state a claim under MCR 2.116(c)(8) for anything premised upon the supposed lack of election inspectors.

The second essential claim of Plaintiffs' complaint is that the Secretary has somehow violated the law and state Constitution by "allowing absent voter ballots to be processed and counted without allowing challengers to observe the video of the ballot [drop] boxes into which these ballots were placed." (Complaint, ¶18). This claim, however, is not supported by any citation to statute or case law establishing that challengers even have the authority to demand to see video footage of ballot drop boxes—let alone that ballots cannot be processed unless and until they do so. Simply put, there is no such law or requirement.

Poll challengers are appointed under MCL 168.730. And under section 733, "[t]he board of election inspectors shall provide space for each challenger, if any, at each counting board that enables the challengers to observe the counting of the ballots. A challenger at the counting board may do 1 or more of the activities allowed in subsection (1), as applicable." MCL 168.733(2). Subsection 733(1) provides, in pertinent part, for the following duties and authority of challengers:

> A challenger may do 1 or more of the following:
>
> (a) Under the scrutiny of an election inspector, inspect without handling the poll books as ballots are issued to electors and the electors' names being entered in the poll book.
>
> (b) Observe the manner in which the duties of the election inspectors are being performed.
>
> (c) Challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector.
>
> (d) Challenge an election procedure that is not being properly performed.
>
> (e) Bring to an election inspector's attention any of the following:
>
> (i) Improper handling of a ballot by an elector or election inspector.
>
> (ii) A violation of a regulation made by the board of election inspectors pursuant to section 742.

(iii) Campaigning being performed by an election inspector or other person in violation of section 744.

(iv) A violation of election law or other prescribed election procedure.

(f) Remain during the canvass of votes and until the statement of returns is duly signed and made.

(g) Examine without handling each ballot as it is being counted.

(h) Keep records of votes cast and other election procedures as the challenger desires.

(i) Observe the recording of absent voter ballots on voting machines. [MCL 168.733(1).]

The Michigan Legislature included no provision in the above list regarding the inspection of ballot drop box security video.

When interpreting a statute, the goal of the courts, "is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Madugula v Taub*, 496 Mich 685, 696 (2014). Courts examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. *Id*. "When a statute's language is unambiguous, . . . the statute must be enforced as written. No further judicial construction is required or permitted." *Id*. Plaintiffs do not identify any ambiguity in MCL 168.733(1) that would warrant judicial interpretation, and certainly none that would support the new legal entitlement to review ballot drop box video that Plaintiffs seek to inject into the statute.

Moreover, Plaintiffs are incorrect in their reading of MCL 168.761d concerning the drop box video. As an initial matter, section 761d(1) expressly provides that ballot drop boxes that were ordered or installed before October 1, 2020 are *exempt* from the requirement. Plaintiffs do not allege what drop boxes are of interest to them, and so it is not possible for Defendant Benson to determine whether such boxes are subject to the requirement. But also, there is no reference in MCL 168.761d to election challengers—or anyone else—being entitled to view the video.

Instead, MCL 168.761d(4)(c) provides only that, "the city or township clerk must use video monitoring of that drop box to ensure effective monitoring of the drop box." And there is also nothing in the statute providing that ballots deposited in a drop box are unable to be processed unless the video is viewed by a challenger, and the processing of such ballots is not contrary to any law—in fact, the processing of absent ballots is expressly required by law. See e.g. MCL 168.765(6), (7) and (8). Plaintiffs offer no other legal support for this argument. Again, Plaintiffs' allegations are so deficient that they fail to state a claim under MCR 2.116(c)(8).

1. There is no violation of the Equal Protection Clause.

The only substantive allegation in Count I states that Plaintiffs seek declaratory and injunctive relief requiring Secretary Benson to, "direct that election authorities comply with Michigan law mandating that election inspectors from each party and allowing challengers access to video of ballot boxes before counting of relevant votes takes place." (Complaint, ¶23).

Article 1, § 2 of the Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." The Equal Protection Clause in the Michigan Constitution is coextensive with the Equal Protection Clause of the United States Constitution. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318 (2010). Equal protection applies when a state either classifies voters in disparate ways or places undue restrictions on the right to vote. *Obama for America v Husted*, 697 F3d 423, 428 (6th Cir, 2012).

One fundamental problem with Plaintiffs' claim is that there is no action by the Secretary of State in this case that would be subject to equal protection analysis. The Secretary of State is *not* treating any voters disparately from any others. In fact, the Plaintiffs make no allegation about any action taken by the Secretary. She has done nothing to classify or distinguish between

or among voters. She has not prevented any party from appointing inspectors or given preferential treatment to inspectors or challengers from one party or group over another. Every qualifying party had the same opportunity to appoint inspectors without assistance or restraint from the Secretary of State. Similarly, the Secretary has not selectively allowed some challengers to view drop box security videos, while denying the same to others. Instead, Plaintiffs broadly allege only that the Secretary should be compelled to instruct local officials not to violate the law—but they fail to make allegations that would allow the Secretary to identify what local officials require such direction, or for what reason. Plaintiffs, therefore, have failed to establish that the Secretary of State has done anything to violate the Equal Protection Clause of the Michigan Constitution, and Count I fails as a matter of law.

2. There is no violation of the "purity of elections" clause.

Article 2, §4 of the Michigan Constitution provides, in part:

> Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

The Michigan Supreme Court has interpreted the "purity of elections" clause to embody two concepts:

> [F]irst, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, 'that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.'" *Socialist Workers Party v Secretary of State*, 412 Mich 571, 596 (1982), quoting *Wells v Kent Co Bd of Election Comm'rs*, 382 Mich 112, 123 (1969). The phrase "purity of elections" "requires . . . fairness and evenhandedness in the election laws of this state." *Socialist Workers Party*, supra at 598. [*Taylor v Currie*, 277 Mich App 85, 96-97 (2007)].

Plaintiffs' complaint does not challenge any enactment by the Legislature, and so their challenge presumably centers on the second concept—fairness and evenhandedness.

Nothing in either Plaintiffs' complaint or their motion identifies anything unfair or uneven in the Secretary's actions. They make unspecific allegations of election inspectors being "excluded," but provide no information about the identity of the inspector, the date or location of the occurrence, or anything else that illuminates any salient details about the alleged event.

Plaintiffs do not allege that the Secretary herself excluded any inspector—or even any challenger—from a counting board, and their claim instead hinges on the Secretary being compelled to instruct unidentified clerks to follow the Michigan Election law. Likewise, Plaintiffs contend that the "purity of elections" somehow requires that challengers be able to view security footage *before* ballots can be processed, but they point to no legal authority supporting such a requirement. Plaintiffs also fail to offer any explanation how the inability of challengers to review video footage before ballots are processed results in an unfair or uneven election.

Regardless, there is no advantage given to any group over another when all parties have the same opportunities to appoint inspectors and all challengers have the same rights and privileges. Plaintiffs have failed to demonstrate that the Secretary of State has done anything to violate the Purity of Elections Clause and Count II fails as a matter of law.

3. There is no "violation" of MCL 168.765a.

Plaintiffs' Count III consists of two paragraphs. In the first, Plaintiffs' partially quote MCL 168.765a(10), but the entirety of that section provides useful context. When interpreting a statute, courts must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sweatt v Dep't of Corr*, 468 Mich 172, 179 (2003). The full subsection here provides:

> The oaths administered under subsection (9) must be placed in an envelope provided for the purpose and sealed with the red state seal. Following the election, the oaths must be delivered to the city or township clerk. Except as otherwise provided in subsection (12), a person in attendance at the absent voter counting place or combined absent voter counting place shall not leave the counting place after the tallying has begun until the polls close. Subject to this subsection, the clerk of a city or township may allow the election inspectors appointed to an absent voter counting board in that city or township to work in shifts. A second or subsequent shift of election inspectors appointed for an absent voter counting board may begin that shift at any time on election day as provided by the city or township clerk. However, an election inspector shall not leave the absent voter counting place after the tallying has begun until the polls close. If the election inspectors appointed to an absent voter counting board are authorized to work in shifts, at no time shall there be a gap between shifts and the election inspectors must never leave the absent voter ballots unattended. **At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed.** A person who causes the polls to be closed or who discloses an election result or in any manner characterizes how any ballot being counted has been voted in a voting precinct before the time the polls can be legally closed on election day is guilty of a felony. [Emphasis added].

Read in context, it seems more reasonable to conclude that this subsection is intended to ensure proper staffing over the course of election day, rather than to create an independent right that may be enforced by third parties (such as Plaintiffs) who are, themselves, not election inspectors.

Nonetheless, it remains entirely unclear how or when this subsection was violated in the course of the November 3, 2020 general election. The second paragraph of Count III broadly asserts that Michigan AVCBs "are not complying with this statute." But Plaintiffs neglect to allege where this took place, or when, or how, or even who was involved (was an inspector for the Republican party not present or was it an inspector for the Democratic party?). Plaintiffs have utterly failed to identify any violation of MCL 168.765a.

As discussed above, there is an inference from the pleadings that Plaintiffs may believe that MCL 168.765a is invoked through the alleged exclusion of Plaintiff Ostergren from some

unidentified counting board at some unknown time, but that would also be erroneous. Again, challengers are not inspectors, and section 765a(10) refers specifically to election inspectors, not challengers. While parties have the ability to appoint challengers, there is no statutory requirement that challengers must be present in order for counting boards to perform their work.

In the absence of any allegations establishing that any actual violation occurred, Plaintiffs' Count III fails as a matter of law as well.

E. Plaintiffs' requested relief is not properly pled.

In their complaint and motion, Plaintiffs request that this Court "*mandate* that Secretary Benson" "order all counting and processing of absentee votes cease immediately until an election inspector from each party is present at each absent voter counting board and until video is made available to challengers of each ballot box," and "order the immediate segregation of all ballots that are not being inspected and monitored as aforesaid and as is required by law." (Comp., Prayer for Relief.) But Plaintiffs' have not requested mandamus relief to compel the Secretary to exercise her supervisory control and direct local election officials to take particular action.

Michigan courts have long recognized that "mandamus is the proper remedy for a party seeking to compel election officials to carry out their duties." *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 582-83 (2018), citing *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 716 (1970), *aff'd* 384 Mich 461 (1971). Even so, mandamus should not issue in this case because, in addition to Plaintiffs' failure to expressly request that relief, Plaintiffs do not have a clear legal right to request that all challengers be provided access to drop box surveillance video before AV ballots can be counted, or that the presence of election inspectors of a particular party be compelled to be present at AVCBs. Nor do Plaintiffs have a clear legal right to halt the processing and counting of AV ballots based on those perceived rights. Likewise, it is not apparent that ordering an elected official, when she

has taken no action herself, to order a county to perform a certain act is appropriate for a mandamus action. See *Berry*, 316 Mich App at 41 (describing mandamus relief, generally).

F. Plaintiffs' verification is defective.

MCL 600.6434(2) requires that a complaint in the Court of Claims must be verified. Plaintiffs' pleading fails to satisfy this requirement. A "verified complaint" means that "the individual with personal knowledge of the facts stated in the document" must swear that those facts are true. See *Russell v City of Detroit*, 321 Mich App 628, 644-64 & n 5 (2017). But here, Plaintiffs attach a "verification" from Plaintiff Ostergren which expressly states that he does *not* have personal knowledge of the facts alleged. (Complaint, p 9). Plaintiffs offer no other verification for their complaint. Consequently, their complaint is not a verified complaint and it fails to meet the requirements of MCL 600.6434, and the pleading should not be considered by this Court.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant Secretary of State Jocelyn Benson respectfully requests that this Honorable Court deny Plaintiffs' motion for emergency declaratory judgement.

Respectfully submitted,

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Dated: November 5, 2020

PROOF OF SERVICE

Lisa S. Albro certifies that on November 5, 2020, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via electronic email:

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/s/Lisa S. Albro
Lisa S. Albro

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC., and ERIC OSTERGREN,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant.

No. 20-000225-MZ

HON. CYNTHIA STEPHENS

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DECLARATION OF JONATHAN BRATER

I, Jonathan Brater, state as follows:

1. I have been employed by the Secretary of State as Director of Elections since January 2, 2020 and in such capacity serve as Director of the Bureau of Elections (Bureau). See MCL 168.32.

2. I bring this declaration in support of Defendant's response in opposition to Plaintiffs' emergency motion for declaratory relief. If called as a witness, I could testify truthfully and accurately as to the information contained within this declaration.

3. I am personally knowledgeable about provisions of the Michigan Election Law that govern absent voter ballots, election inspectors, election challengers, and the tabulation of ballots.

4. Public Act 177 of 2020, enacted on October 6, 2020, provides statutory requirements for absent voter ballot drop boxes, including video surveillance, but exempts from these requirements or absent voter ballot drop boxes ordered before October 1, 2020. Although clerks can enter the locations of their drop boxes using the state Qualified Voter File, the Bureau of Elections does not possess or maintain any information that would confirms when a jurisdiction may have ordered or installed a drop box, or whether any given drop boxes used in the 2020 general election were being monitored by video surveillance.

5. There is no way for a municipal jurisdiction to determine if an absent voter ballot was delivered using a ballot drop box once it has been removed from the drop box and combined with other absent voter ballot envelopes for processing. It may be possible to determine whether or not an absent voter ballot was mailed because of a postage cancelation, but there are many non-mail ways to deliver an absent voter ballot envelope, including hand delivery and delivery by an immediate family or household member.

6. At absent voter counting boards, election inspectors review the absent voter ballot envelope to verify that the clerk has reviewed the signature and verify that the voter is on the pollbook or absent voter list. Election inspectors then open the envelope, verify that the ballot stub matches the ballot number on the envelope, and then remove the ballot secrecy sleeve from

the ballot envelope. These steps can be done on the Monday before election day at a jurisdiction utilizing pre-processing.

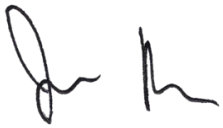
7. After the secrecy sleeve is no longer paired with the envelope, election inspectors remove the ballot number stub and remove the ballot from the secrecy sleeve, flatten it, and tabulate the ballot. One the ballot has been removed from the envelope, it can no longer be tied back to the envelope it came in and therefore can no longer be tied back to the individual voter. The only exception is challenged ballots, which include a number that is covered up; these ballots can be identified if needed. The vast majority of absent voter ballots are not challenged.

8. As of 9:00 a.m. on November 5, approximately 3.3 million absent voter ballots had been received in Michigan. The vast majority of these were tabulated, as part of the more than 5.5 million ballots total that were tabulated, during the election according to unofficial results. To my knowledge all tabulation of ballots, including tabulation of ballots at absent voter counting boards, is complete.

9. Even if it were practical or possible at this time to again review 3.3 million absent voter ballot envelopes that have already been reviewed by an election clerk and by election inspectors, and even if an issue with the envelope were discovered, it would not be possible now to connect the ballot back to that envelope. Instead, the ballot would already have had its ballot number stub removed and been tabulated with the rest of the ballots.

10. I am not aware of any complaints received by the Bureau of Elections that an election inspector was not allowed to be present at an absent voter counting board in any jurisdiction in this State.

11. I declare under the penalty of perjury that the foregoing is true and correct, based on personal knowledge.



Jonathan Brater

IN THE STATE OF MICHIGAN
COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC. and ERIC OSTERGREN, Plaintiffs, DNC, Intervening Plaintiff, v. JOCELYN BENSON, in her official capacity as the Michigan Secretary of State, Defendant.	Civil Action No. 20-000225-MM HON. CYNTHIA STEPHENS

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**Pro hac vice motion forthcoming*

PROPOSED INTERVENORS' AMICUS BRIEF

INTRODUCTION

At this point, nearly all of the votes in the election have been counted. The people of Michigan have clearly spoken, and the state has been called by multiple major news outlets for Vice President Joe Biden, including Fox News, *The Wall Street Journal*, CNN, *The New York Times*, and many others. And yet, the Trump Campaign makes a last-ditch effort to use the courts to delegitimize and threaten the votes of lawful Michigan voters. The lawsuit is baseless, both in law and fact. Emergency relief should be denied, and all outstanding ballots must be counted.

The issues with the Trump Campaign's complaint and briefing, as well as its extraordinary request for relief to which it is clearly not entitled, are myriad, and there are multiple grounds why its motion can and must be rejected. As a threshold matter, the complaint is based on rights conjured from whole cloth. The Trump Campaign seeks declaratory relief under MCR 2.605 but fails to meet its most basic requirement to establish an "actual controversy" based on facts rather than speculation. And it purports to vindicate rights that do not exist in law, including entirely fabricated claimed rights to unfettered video surveillance footage of voters. The lawsuit is also filed against the wrong defendant. Though it takes issue with purported action taken by county boards, the Trump Campaign sues the Michigan Secretary of State (the "Secretary") alone. But the Secretary has no authority in this particular dispute.

This Court should reject this lawsuit, which is just one more distraction advanced by the Trump Campaign to sow doubt and disrupt democracy. The people of Michigan have made their preference clear. The Trump Campaign may not be happy about their preference, but their baseless attempts interfere with the democratic preference through this lawsuit must be rejected.

BACKGROUND

Donald J. Trump for President, Inc. and Eric Ostergren (together, the "Trump Campaign") filed this lawsuit to obstruct the counting process of lawful ballots in Michigan. Specifically, the

Trump Campaign asks the Court to stop the counting of all absentee ballots and segregate those ballots that have already been cast. They do so based on entirely specious claims that their rights to observe are being obstructed, devoid of factual allegations to support such claims. This lawsuit is part of a continuing pattern of the Trump Campaign to create rights to interfere with the voting and counting process that do not actually exist in law. Over and over again, courts have rejected these baseless attempts. And for good reason. This case is no different; the Trump Campaign's motion should be similarly and decidedly rejected.

As a starting point, there is no constitutional right for campaigns or political parties to observe elections activity or "challenge" voter's ballots. The right to do so is created and defined by statutory law, which varies considerably from state to state. *Donald J Trump for President, Inc v Boockvar*, No. 20-cv-966, 2020 WL 5997680, at *67 (WD Pa, Oct 20, 2020) ("'[T]here is no individual constitutional right to serve as a poll watcher.'" (quoting *Pa Democratic Party v Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *30 (Pa, Sept 17, 2020)); *Republican Party of Pa v Cortés*, 218 F Supp 3d 396, 413-414 (ED Pa, 2016) (similar); *Polasek-Savage v Benson*, No. 20-000217-MM, slip op (Mich Ct Cl, Nov 3, 2020) (similar); Order, *Kraus v Cegavske*, No. 20 OC 00142 (Nev Dist Ct, Oct 29, 2020) *motion to stay denied*, No. 82018 (Nev Sup Ct, Nov. 3, 2020) (denying mandamus because petitioners including Donald J. Trump for President and others failed to cite any constitutional provision, statute, rule, or case that supports . . . request" for increased access to mail ballot processing and counting).

Under the relevant Michigan law, a "challenger" may challenge the validity of an absent voter ballot at one of two locations: a precinct or an absent voter counting board. MCL 168.733. Challengers must be registered voters in Michigan who are not candidates or election inspectors, MCL 168.730(2), and appointed by political parties or other organized groups, MCL 168.730(1).

Challengers may: 1) observe the manner in which election inspectors perform their duties, 2) challenge the validity of ballots, 3) challenge an election procedure not properly performed, or 4) bring various election code violations to the attention of the election inspectors. MCL 168.733(1). Challenged absent voter ballots are processed and tabulated in a routine manner pursuant to state guidance, whether the challenge occurs at the precinct or the absent voter counting board. Mich. Bureau of Elections, *Managing Your Precinct on Election Day*, 24 (Jan. 2020), https://www.michigan.gov/documents/sos/Managing_Your_Precinct_on_Election_Day_391790_7.pdf ("If an absent voter ballot being processed in the precinct is challenged, prepare the ballot as a challenged ballot and make a notation on the Challenged Voters page in the Pollbook. Proceed with routine processing and tabulation of the ballot."); Mich. Bureau of Elections, *Absent Voter Ballot Election Day Processing*, 14 (Oct. 2020), https://www.michigan.gov/documents/sos/VIII_Absent_Voter_County_Boards_265998_7.pdf (noting that the part of the absent voter counting board election-day procedure is to "process and tabulate challenged ballots").

Challengers may only challenge a voter who they have "good reason to believe is not a registered elector." MCL 168.733(1)(c). Challengers are prohibited from engaging in "disorderly conduct" or voter intimidation. MCL 168.733(4), 168.733(5). They may not "make a challenge indiscriminately," "handle the poll books . . . or the ballots," or "interfere with or unduly delay the work of the election inspectors." They also must take an oath not to communicate any information about the "processing and tallying of votes . . . until after the polls are closed." MCL 168.765a(9). Challengers' misbehavior may also result in criminal penalties. *Id.*

Michigan law limits the number of challengers at a precinct to "not more than 2" and at counting boards to "not more than 1." MCL 168.730. Just days ago, the Michigan Court of Claims ruled that "it is not apparent plaintiffs have a clear legal right to request that their chosen number

of election challengers be permitted at an absent voter counting board." *Polasek-Savage v Benson*, No. 20-000217-MM (Mich Ct Cl, Nov 3, 2020) (order denying plaintiffs' emergency motion for declaratory judgment). Once they are duly appointed and accepted into the precinct or absent voter counting board, election inspectors may not prevent their presence, MCL 168.734, and must provide challengers with a space where they may observe ballot counting, MCL 168.733(1)(c). The Legislature apparently recognized that its statutory guidance regulating the conduct of absent voter counting boards was not comprehensive, and therefore vested in the Secretary of State the authority to issue "instructions . . . for the conduct of absent voter counting boards or combined absent voter counting boards" MCL 168.765a(13). Pursuant to that authority, the Secretary delegated the authority to local jurisdictions to agree, for the purposes of combined absent voter counting boards, on "how and under what conditions challengers and other individuals permitted into the facility will be allowed in." Mich Bureau of Elections, *Absent Voter Ballot Election Day Processing*, 11 (Oct. 2020), https://www.michigan.gov/documents/sos/VIII_Absent_Voter_County_Boards_265998_7.pdf. This election, of course, concerns about the conditions under which individuals are allowed into the polling place have been paramount in light the COVID-19 pandemic and the social distancing required to prevent transmission of the virus.[1]

Through this action, the Trump Campaign asks this Court to rewrite Michigan's challenger laws, under the auspices of a claim for an equal protection violation under the Constitution. Its claims are meritless. Neither it nor its voters nor its candidates are suffering from or under any threat of suffering from a cognizable constitutional injury. If, however, the Trump Campaign were

[1] Dave Boucher and Christina Hall, Michigan clerks have 'deep concern' about violence, COVID-19 at polls on Election Day, Detroit Free Press, Oct. 30, 2020, https://www.freep.com/story/news/politics/elections/2020/10/30/michigan-clerks-unrest-covid-19-election-day/6037886002/.

to be successful in using this meritless and cynical action to obstruct the timely and lawful counting of ballots in Michigan, or to otherwise slow the certification of the election in any way, the Intervening Plaintiff and its members, voters, and candidates with whom it affiliates would suffer severe equal protection violations. This Court should issue a definitive order declaring that the counting of absentee ballots must continue and that any action by Defendant to stop counting the ballots will result in a violation of Michigan's Equal Protection Clause.

ARGUMENT

I. The Trump Campaign is not entitled to a declaratory judgment.

As the Trump Campaign acknowledges, this Court has the power to enter declaratory judgment only in cases where there is an "actual controversy." *UAW v Cent Mich Univ Trustees*, 295 Mich App 486, 495 (2012); Michigan Court Rule 2.605(A)(1). "An 'actual controversy' under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to … preserve legal rights." *Id.* The requirement prevents a court from deciding hypothetical issues. *Id.* Plaintiffs bear the burden of proving that an actual controversy exists. *League of Women Voters of Mich v Sec'y of State*, Nos 350938, 351073, 2020 WL 423319, at *5 (Mich Ct App, Jan 27, 2020).

The Trump Campaign has not put forth even a modicum of persuasive explanation—let alone evidence—to support its conclusory allegation that the Michigan laws that govern the process by which duly appointed challengers may observe specific elections processes and challenge ballots. It has not presented evidence that the Trump Campaign has been denied the number of challengers permitted by law—two at a polling place and one at a counting board—or that its challengers have not been allowed to make challenges where they have a "good reason to believe" that the voter is not a registered voter. This deficiency in the evidence is a death knell to the Trump Campaign's declaratory judgment action because, to succeed on a Motion under MCR 2.605, it must "plead and prove facts," and may not merely rely on hypothetical injuries. *Mich*

State Police Troopers Ass'n, Inc v Dep't of State Police, No. 350863, 2020 WL 4039063, at *3 (Mich Ct App, July 16, 2020). On this ground standing alone, the request for declaratory relief should be denied.

II. The Secretary is not the proper Defendant.

As is clear from the face of the Trump Campaign's own Complaint, the Secretary is not the proper defendant for this lawsuit. The Trump Campaign complains that: (1) some absent voter counting boards have allegedly operated without the presence of inspectors from each political party; and (2) some election challengers have purportedly been denied the opportunity to review video surveillance of ballot drop-off boxes. Compl. ¶¶ 11, 18. Even if these claims were legally viable or factually supported (and they are neither), the Complaint fails to allege that the sole defendant in this matter -- *the Secretary* -- has taken any objectionable action. Instead, the complaint clearly alleges that unidentified "Michigan absent voter counting boards" are not complying with the requirement. Compl. ¶ 11.

Michigan's absent voter counting boards are created by *local governments* and are operated by the same. MCL 168.679(1). Thus, the Trump Campaign can only seek relief from the local government entities. But because this Court lacks jurisdiction over such parties, see MCL 600.6419 (describing this Court's jurisdiction); *Mays v Snyder*, 323 Mich App 1, 47; 916 NW2d 227 (2018) (noting this Court's jurisdiction does not extend to local governments), aff'd, *Mays v Governor of Michigan*, --- NW2d --- (Mich, July 29, 2020), joinder is impossible. Moreover, the Trump Campaign cannot overcome this incurable mistake by generally lodging vague allegations against the Secretary. *Polasek-Savage*, No. 20-000217-MM slip op (alleging the Secretary's general supervisory control over local election officials is insufficient to support an action for declaratory relief when the *county* is the responsible party). Thus, the Trump Campaign's

Complaint, which is solely addressed to the purported activity of the counting boards cannot be sustained and must be dismissed.

The Complaint's claims that election challengers have been denied the opportunity to review video surveillance are impermissible for the same reason, and then some. Michigan's Election Code does not give a person or organization the right to monitor video surveillance of voters casting ballots, whether in-person or by using drop-boxes. In support of the Trump Campaign's contention to the contrary, the Complaint and emergency motion cite only MCL 168.730, which permits political parties, incorporated organizations, or organized committees of interested citizens to designate challengers to serve at *precincts* or *counting boards*. Compl. at ¶ 12; see also MCL 168.730(1). But these provisions do not include any authority that gives anyone a right to monitor voters casting ballots—whether at a drop box or anywhere else. Thus, the Complaint fails to allege "what action, if any, was taken by the Secretary of State" that violated any right, or "how the relief [] requested against the Secretary of State can issue," nor could it, as no such right exists. *Polasek-Savage*, No. 20-000217-MM slip op.

III. The Trump Campaign's claims fail as a matter of law.

A. The Trump Campaign does not have a statutory right to the relief it seeks.

To remedy the violations of Michigan law alleged in its Complaint and emergency motion, the Trump Campaign seeks the extraordinary remedy of an immediate cessation of all counting "until an election inspector from each party is present at each absent voter counting board and until video is made available to challengers of each ballot box" and "the immediate segregation of all ballot that are not being inspected." Mot 8; *see also* Compl 8. This requested relief is entirely unprecedented and understandably so—it is wholly unmoored from statute and completely unjustified.

Even if the Trump Campaign could prove that the statutes upon which it relies were violated (which it has not and cannot), Michigan law provides a clear remedy for such violations and it does not include anything remotely like what the Trump Campaign requests. Specifically,

> [a]ny officer or election board who shall prevent the presence of any such challenger as above provided, or shall refuse or fail to provide such challenger with conveniences for the performance of the duties expected of him, shall, upon conviction, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison not exceeding 2 years, or by both such fine and imprisonment in the discretion of the court.

MCL 168.734. That is all. Conspicuously absent from this provision is *any* mention of cessation of tabulation or segregation of ballots. And neither MCL 168.765 nor Senate Bill 757, which amended MCL 168.761d to require video monitoring of drop boxes and on which the Trump Campaign also relies, contemplates these responses to perceived violations of the absent voter counting board or ballot drop-box protocols. In fact, MCL 168.761d, as amended by Senate Bill 757, states that it is "*[t]he city or township clerk*" who "must use video monitoring of [any outdoor] drop box to ensure effective monitoring of that drop box." MCL 168.761d (emphasis added). The Trump Campaign has manufactured these remedies from whole cloth, and they are without any precedent or authority in either Michigan statutes or caselaw. In addition to being procedurally improper, see supra Parts I-II, and wholly inappropriate at this late stage of the election, see infra Part V, the laws on which the Trump Campaign's suit is based simply do not provide a right to the relief they seek.

Nor, for that matter, do these statutes provide any private right for *these Plaintiffs* to challenge alleged violations of these observation rules. It might be true that the statutes convey privileges to individuals who are *actually permitted* to serve as challengers. See, e.g., MCL 168.733(1) (enumerating activities that "[a] challenger may do"). But it is not clear that either the

Trump Campaign or Plaintiff Ostergren were ever permitted to enter the absent voter counting board (indeed, his claim is premised on the idea that he was not).[2] It is theoretically possible that challengers have rights under Michigan statute to observe ballot processing *once they are admitted* inside absent voter counting boards (although even this is not clearly established by statute). But *putative* challengers who are not admitted to absent voter counting boards, which is the crux of Plaintiffs' claims, certainly possess not legal rights under Michigan law. *Polasek-Savage*, No. 20-000217-MM slip op (holding that "it is not apparent plaintiffs have a clear legal right to request that their chosen number of election challengers be permitted at an absent voter counting board."). The Trump Campaign does not—nor could it—point to any statute or authority conferring a right on Plaintiff Ostergren or anyone to serve as a challenger. See *Boockvar*, 2020 WL 5997680, at *67 ("[T]here is no individual constitutional right to serve as a poll watcher." (quoting *Pa Democratic Party*, 2020 WL 5554644, at *30); *Cortés*, 218 F Supp 3d at 408 (similar); *Polasek-*, No 20-000217-MM, slip op at 3 (Mich Ct Cl Nov 3, 2020) (similar); *Kraus v Cegavske*, No 20 OC 00142 1B, slip op at 10-11 (Nev Dist Ct Oct 29, 2020) (denying mandamus where petitioners, including Trump Campaign, failed to cite "any constitutional provision, statute, rule, or case that supports . . . request" for increased access to mail ballot processing and counting), stay denied, No 82018 (Nev Nov 3, 2020). Certainly, the Trump Campaign itself in its organizational capacity could not serve as a "challenger" under Michigan law. Accordingly, neither Plaintiff Ostergren nor the Trump Campaign has any rights under these laws that they can hope to vindicate through this suit, and therefore lack any claim to relief.

B. The Trump Campaign's Purity of Elections Clause claim lacks merit.

The Trump Campaign's claim under the Purity of Elections Clause, Const 1963, art 2,

[2] Plaintiff Ostergren merely alleges that he was "certified and trained." Compl ¶ 2.

§ 4(2), too, lacks merit. The relevant clause states: "[T]he legislature shall enact laws . . . to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." "The phrase 'purity of elections' does not have a single precise meaning. However, it unmistakably requires fairness and evenhandedness in the election laws of this state." *McDonald v Grand Traverse Cnty Election Comm'n*, 255 Mich App 674, 692-693; 662 NW2d 804 (2003) (cleaned up). The "purity of elections" clause has been interpreted by the Michigan Supreme Court to embody two separate concepts: first, that the constitutional authority "to enact laws to preserve the purity of elections" resides in the Legislature; and second, that "any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm." *Wells v Kent Cnty Bd of Election Comm'rs*, 382 Mich 112, 123; 168 NW2d 222 (1969).

Here, however, the Trump Campaign makes no allegation that "any law enacted by the Legislature" "adversely affects the purity of elections"; to the contrary, it asserts that the Legislature enacted the statutes allowing for inspectors and challengers at AVCBs *pursuant* to the Purity of Elections Clause and thus that the Secretary must either direct local officials to comply with those statutes or be in violation of the Purity of Elections Clause herself. Motion at ¶¶ 21-24. The Trump Campaign cites no authority to support such a cause of action under the Purity of Elections Clause. See *id.* Moreover, "[t]his argument assumes that [the Secretary and local officials] violated provisions of the Michigan Election Law, a premise that is incorrect for the reasons already discussed. Therefore, plaintiffs have failed to establish that defendants violated the Purity of Elections Clause." *Barrow v Detroit Election Comm'n*, 305 Mich App 649, 676-677; 854 NW2d 489 (2014). Secretary Benson, along with Attorney General Nessel, have been clear

about the rules of this election,[3] even and especially when the Trump Campaign has urged voters to flout those rules.[4] When individuals have violated Michigan's election laws, the Attorney General has acted swiftly to protect the integrity of this election.[5] Plaintiffs present no evidence that this election has been anything but fair and evenhanded.

C. The Trump Campaign has not pled a viable equal protection claim.

The absentee ballot inspection and processing procedures described in the emergency motion reflect a rational, non-discriminatory approach to election administration. Contrary to the Trump Campaign's conclusory assertions, there are no equal protection violations to be found. The Trump Campaign does not even *attempt* to identify any fundamental right that has been violated or any disparate treatment of some voters over others, instead merely stating that "[m]ost United States Supreme Court rulings concerning the right to vote frame the issue in terms of the Equal Protection Clause." Mot. ¶ 19 n 1. But this generalized statement gets them nowhere. Nothing about the procedures for reviewing, approving, or counting absentee ballots at issue in this case burdens the opportunity for any Michigander to cast a ballot and have it counted, and the Trump Campaign has thoroughly failed to make any showing to the contrary.

At bottom, the Trump Campaign's argument falls back on the notion that if some unlawful absentee ballots evade detection, then the lawful ballots of *all* other voters are diluted. Notably,

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[3] Dave Boucher, *Michigan leaders warn: Voting twice is a felony, even if Trump suggests it*, Detroit Free Press (Sept. 3, 2020), https://www.freep.com/story/news/politics/elections/2020/09/03/michigan-trump-voting-twice-illegal-absentee-ballot/5703359002/.

[4] Maggie Haberman and Stephanie Saul, *Trump Encourages People in North Carolina to Vote Twice, Which Is Illegal*, NY Times (Sept. 2, 2020), https://www.nytimes.com/2020/09/02/us/politics/trump-people-vote-twice.html.

[5] Department of Attorney General, *AG Nessel Files Felony Charges Against Jack Burkman, Jacob Wohl in Voter-Suppression Robocalls Investigation* (Oct. 1, 2020), https://www.michigan.gov/ag/0,4534,7-359--541052--,00.html.

the Trump Campaign cannot identify a single precedent adopting this theory.[6] And, in fact, courts across the country have repeatedly *rejected* similar theories as a basis for plaintiffs to pursue election law challenges—including in other cases brought by the Trump Campaign itself. The conclusion of these courts is both correct and unsurprising: claims of vote dilution based on fears of potential fraud is fundamentally speculative *and* applies to all voters equally, making it an ill-fit for an equal protection challenge.

For example, in *Boockvar*, 2020 WL 5997680, the court soundly rejected a challenge by the Trump Campaign and other Republican Party affiliates who challenged Pennsylvania's restrictions on poll watchers and ballot challenge opportunities under the theory, like here, that enhanced security measures were necessary to prevent fraud and the dilution of lawfully submitted votes. The federal court correctly ruled that the plaintiffs' purported fears of voter fraud that animated their claims were "based on a series of speculative events—which falls short of the requirement to establish a concrete injury." *Id.* at *33. The problem with the plaintiffs' theory of harm by fraud and vote dilution, the court explained, is that "it is almost impossible for them to present anything other than speculative evidence of injury. That is, they would have to establish evidence of a certainly impending illegal practice that is likely to be prevented by the precautions they seek. All of this sounds in 'possible future injury,' not 'certainly impending' injury." *Id.* at *34.

[6] Under the Trump Campaign's apparent theory that any discrepancy in opportunities for voter challenges violates equal protection, the Trump Campaign's *own requested relief* would inflict this very injury. Given that hundreds of thousands of mail ballots have already been approved without the Trump Campaign's requested inspection procedures, the prospective relief that the Trump Campaign demands would subject voters who cast absentee ballots to different treatment depending on whether their ballot was processed before or after this lawsuit was filed.

Similarly, in *Donald J Trump for President, Inc v Cegavske*, No. 2:20-cv-1445; JCM (VCF), 2020 WL 5626974 (D Nev, Sept 18, 2020), the Trump Campaign and others brought an equal protection challenge against a newly enacted Nevada statute that expanded mail-in voting. The court dismissed the complaint, holding that "Plaintiffs' alleged injury of vote dilution is impermissibly 'generalized' and 'speculative.'" *Id.* at *4. Plaintiffs, the court continued "never describe how their member voters will be harmed by vote dilution where other voters will not. As with other 'generally available grievances about the government,' plaintiffs seek relief on behalf of their member voters that 'no more directly and tangibly benefits them than it does the public at large.'" *Id.* (alterations adopted) (quoting *Lujan v Defenders of Wildlife*, 504 US 555, 573-74 (1992)).

Other cases have reached similar results. *See Martel v Condos*, No. 5:20-cv131, 2020 WL 5755289, at *3-5 (D Vt, Sept 16, 2020) (holding voters challenging a Secretary of State directive expanding vote-by-mail lacked the concrete and particularized injury necessary for standing); *Paher v Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2089813, at *4-5 (D Nev, Apr 30, 2020) (same); *Am Civil Rights Union v Martinez-Rivera*, 166 F Supp 3d 779, 789 (WD Tex, 2015) ("[T]he risk of vote dilution" as a result of allegedly inaccurate voter rolls "[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."); cf. *United States v Florida*, No. 4:12cv285-RH/CAS, 2012 WL 13034013, at *1 (ND Fla, Nov 6, 2012) (rejecting motion to intervene).

So too here. The Trump Campaign's claimed injury—to the extent it even asserts one—is wholly speculative. It is also a generalized grievance that claims no "special injury or right or

substantial interest that would be detrimentally affected in a manner different from the citizenry at large," which is a prerequisite to standing. *Lansing Sch Educ Ass'n*, 487 Mich at 359.[7]

In any event, while vote dilution is a recognized violation of equal protection in certain contexts—such as when laws are crafted that structurally devalue one community's or group of people's votes relative to another's, see, e.g., *Reynolds v Sims*, 377 US 533, 563-64 (1964)—it is also true that "[t]he Constitution is not an election fraud statute." *Minn Voters Alliance v Ritchie*, 720 F3d 1029, 1031 (CA 8, 2013) (quoting *Bodine v Elkhart Co Election Bd*, 788 F2d 1270, 1271 (CA 7, 1986)). There is simply no authority for enlisting the judiciary to unilaterally amend the elected branches' chosen methods of securing the integrity of elections.[8]

To the contrary, courts have routinely—and appropriately—rejected such efforts on the merits as well. *See Minn Voters Alliance*, 720 F3d at 1031-32 (rejecting challenge grounded in vote dilution theory to decision by election administrators to allow same-day registrants to vote before verifying their voting eligibility to the satisfaction of plaintiffs); *Boockvar*, 2020 WL 5997680, at *67-68 (rejecting equal protection challenge to poll watcher restrictions grounded in vote dilution theory because restrictions on voter challenges did not burden a fundamental right,

[7] That Michigan courts have held that plaintiffs in a *mandamus* action relating to elections need not "show a substantial injury *distinct* from that suffered by the public in general" is of no moment. *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987) (emphasis added). First, the Trump Campaign does not seek to enforce any rights by mandamus. Second, it has *no* injury (substantial or otherwise), so whether it is distinct from that of anyone else is irrelevant.

[8] *Bush v Gore*, 531 US 98 (2000) (per curiam) does not save the Trump Campaign's claims. In *Bush*, the U.S. Supreme Court considered "whether the use of standardless manual recounts" by some, but not all, Florida counties in the aftermath of the 2000 presidential election violated the Equal Protection Clause of the U.S. Constitution. *Id.* at 103. The Court specifically clarified that it was *not* deciding "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109. Instead, it was addressing a situation where the counting of ballots lacked even "minimal procedural safeguards." *Id.* Here, there are uniform requirements in place that provide those safeguards.

including the right to vote, nor discriminate based on a suspect classification); *Cook Co Rep Party v Pritzker*, No. 20-cv-4676, 2020 WL 5573059, at *4 (ND Ill, Sept 17, 2020) (denying a motion to enjoin a law expanding the deadline to cure votes because plaintiffs did not show how voter fraud would dilute the plaintiffs' votes); *Cortés*, 218 F Supp 3d at 406-07 (rejecting a requested expansion of poll watcher eligibility that rested on premise that voter fraud would dilute weight of the plaintiffs' votes); *see also Common Cause Rhode Island v Gorbea*, 970 F3d 11, 15 (CA 1, 2020) (enjoining a ballot witness signature requirement during pandemic notwithstanding arguments that doing so would allegedly increase the risk of voter fraud and put Republican candidates at risk); *Short v Brown*, 893 F3d 671, 679 (CA 9, 2018) (rejecting equal protection challenge to California practice of permitting voters in some counties to receive a ballot by mail automatically, while requiring voters in our counties to register to receive a ballot by mail); *Partido Nuevo Progresista v Perez*, 639 F2d 825, 827-28 (CA 1, 1980) (rejecting challenge to purportedly invalid ballots because the "case does not involve a state court order that disenfranchises voters; rather it involves a Commonwealth decision that en franchises them. [sic] [P]laintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting").

Finally, and importantly, there is no constitutional right for any party or individual to serve in a poll watching capacity to challenge ballots. In *Boockvar*, as one recent example, the court held that plaintiffs, including prospective poll watchers, did not have standing to assert a right to expanded opportunities to monitor the polls and lodge challenges because "there is no individual constitutional right to serve as a poll watcher," and a theory of harm that turns on "dilution of votes from fraud caused from the failure to have sufficient poll watchers . . . . rests on evidence of vote dilution that does not rise to the level of a concrete harm." 2020 WL 5997680, at *37, *67; *see also Cortés*, 218 F Supp 3d at 408; *Cotz v Mastroeni*, 476 F Supp 2d 332, 364 (SDNY, 2007);

Dailey v Hands, No 14-423, 2015 WL 1293188, at *5 (SD Ala, Mar 23, 2015) ("[P]oll watching is not a fundamental right protected by the First Amendment."); *Turner v Cooper*, 583 F Supp 1160, 1162 (ND Ill, 1983) ("Plaintiffs have cited no authority . . . , nor have we found any, that supports the proposition that [the plaintiff] had a first amendment right to act as a poll watcher."). Inspection processes are creatures of state law.

Michigan's challenge regime thus cannot impose a constitutional injury on the Trump Campaign because the only right to challenge ballots that the Trump Campaign has is what Michigan has decided to give them in its state law. And that state law applies equally to everyone—the Trump Campaign is not disadvantaged as compared to anyone else who would engage in the challenge process. Thus, Plaintiffs here lack a concrete and cognizable injury that would permit them to bring this action.

IV. The Trump Campaign's claims fail as a matter of proof.

Even if one were to accept that their legal theory is viable—it is not—the Trump Campaign failed to adduce proof of the factual predicate for its claims. The only factual support for its claims is the complaint verified by Plaintiff Ostergren and a late-filed affidavit reflecting a hearsay accounting of an incident at a single counting board location. Neither supports the Trump Campaign's claims.

The verified complaint states that "Eric Ostergren was excluded from the counting board during the absent voter ballot review process." Compl ¶ 2. The Trump Campaign does not claim that it designated Ostergren to be a challenger, a requirement under MCL 168.730(1). And, Ostergren's exclusion does not mean that the Trump Campaign or Republican Party was precluded from designating challengers to serve at the absent voter counting board in Roscommon County. Indeed, Ostergren has no individual or independent right to be a challenger; if anything, that right belongs to "[a] political party—or an incorporated organization or organized committee of

interested citizens." MCL 168.730(1). Exclusion from a counting board of a single individual, without more, is insufficient to suggest that the Trump Campaign or Republican Party and their representatives are being excluded from observing. See *Weymers v. Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997) (holding "a complaint be specific enough to reasonably inform the adverse party of the nature of the claims against him"); MCR 2.111(B)(1) (same).

The late-filed affidavit illuminates nothing. It is a double hearsay account of an incident involving a challenger at a counting board—and, indeed, suggests that the Trump Campaign *is* being granted access to observe the processing and counting of ballots. It also does nothing to support the claims that the Plaintiffs make in the Complaint. Instead it introduces brand new and entirely different allegations that are based entirely on a chain of rumor—not at all on personal knowledge—and thus cannot possibly serve as the basis for finding that Plaintiffs are likely to succeed on the claims they actually make in this case. To be clear, even if the Trump Campaign were to amend to add new claims based on these new third-party rumors, it could not succeed. The affidavit's baseless assertions of pre-dating ballots are easily explained by Michigan's process for tracking and processing ballots *after* the election, i.e. in the days after the ballots were actually received.

V. The counting of ballots must continue.

Ultimately, the Trump Campaign's lawsuit challenges the core principle of our electoral process—that every vote must be counted. See *Reynolds*, 377 US at 555 n 29 ("'There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.'") (quoting *South v Peters*, 339 US 276, 279 (1950) (Douglas dissenting). In light an unprecedented global pandemic and their newly enshrined constitutional right to vote absentee, more than 3 million Michiganders (over 60% of those who voted) chose to vote absentee in this year's general election.

The Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws." Const 1963, art 1, § 2. Thus, having adopted a system by which absentee voting is available to all voters, Michigan may not "'by later arbitrary and disparate treatment, value one person's vote over that of another.'" *Obama For Am v Husted*, 888 F Supp 2d 897, 910 (SD Ohio, 2012), aff'd, 697 F3d 423 (CA 6, 2012) (quoting *Bush v Gore*, 531 US 98, 104-105 (2000) (also holding Equal Protection Clause applies to "the manner of [the] exercise [of voting]").

All Michigan voters who cast lawful absentee ballots should have equal access to having their vote counted, but the Trump Campaign seeks relief that would jeopardize this right. The State does not have even a legitimate, much less a compelling, interest in the disparate treatment of similarly situated voters. See *Obama for America*, 888 F Supp 3d at 910 (holding a state had no compelling interest in setting an in-person early voting deadline, which valued the rights of military voters over nonmilitary voters). Thus, any order to stop the counting of ballots, as the Trump Campaign demands, would amount to a violation of Michigan's Equal Protection guarantee.

In short, every vote should be counted. "[T]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place." *United States v Saylor*, 322 US 385, 387-88 (1944).

CONCLUSION

For the reasons stated, Intervening Plaintiff respectfully submits that this Court should deny the Trump Campaign's Emergency Motion for Declaratory Judgment.

Dated this 5th day of November, 2020.

Respectfully submitted,

/s/ *Scott R. Eldridge*
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PROOF OF SERVICE

Scott Eldridge certifies that on the 5th day of November 2020, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via email.

s/ *Scott Eldridge*
Scott Eldridge